BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD J. BEARDSLEE, Plaintiff, **v.** **JEANNE WOODFORD, Director and JILL BROWN, Warden,** Defendants.	**CAPITAL CASE** C 04-5381 JF

SUPPLEMENTAL EXHIBIT IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Date: January 6, 2004
Time: 10:30 a.m.
Courtroom: 3

BR
639

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD J. BEARDSLEE, Plaintiff, **v.** **JEANNE WOODFORD, Director and JILL BROWN, Warden,** Defendants.	**CAPITAL CASE** C 04-5381 JF **SUPPLEMENTAL EXHIBIT IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** Date: January 6, 2004 Time: 10:30 a.m. Courtroom: 3

In his complaint, motion for preliminary injunction, and reply to defendants' opposition to injunctive relief Beardslee represents that he has exhausted his administrative remedies with respect to the Eighth and First Amendment claims presented in this action. He did not, however, included copies of the administrative appeals and responses with his exhibits. Attached as Defendants' Exhibit 7 are Beardslee's appeals and responses from the Department of Corrections.

ER 640

Dated: January 3, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

/s/

DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Defendants

LAW OFFICES OF STEVEN S. LUBLINER
P.O. Box 750639
Petaluma, CA 94975
Phone: (707) 789-0516
Fax: (707) 789-0515
E-mail: sslubliner@comcast.net

November 24, 2004

Jill L. Brown, Acting Warden
San Quentin Prison
San Quentin, CA 94964

Re: Donald J. Beardslee, C-82702

Dear Warden Brown,

I am representing death row inmate Donald J. Beardslee in challenges to California's method of execution. Mr. Beardslee will not be selecting a method of execution. Therefore, by law, he will be executed by lethal injection. Mr. Beardslee intends to bring suit in federal court under 42 U.S.C. § 1983 challenging California's lethal injection procedure as violating his rights under the Eighth and First Amendments to the United States Constitution.

Mr. Beardslee is required to exhaust his administrative remedies in order to bring suit in federal court. Enclosed are two original 602 forms signed by Mr. Beardslee in which he separately exhausts his claims under the Eighth and First Amendments. Mr. Beardslee will also be delivering originals to the Appeals Coordinator to be sent to you. Please note that this administrative appeal is being filed as an emergency appeal pursuant to 15 Cal. Code Regs. § 3084.7.

I do not envision that it will be necessary for you to speak with Mr. Beardslee to resolve his appeals. Should you wish to interview him about his claims, please contact me first so that I can arrange to be present.

Very truly yours,

Steven S. Lubliner

enc.

BR
642

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM

CDC 602 (12/87)

Location: Institution/Parole Region 1. SQ 2. _____ Log No. 1. 04-2953 2. _____ Category 10

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
BEARDSLEE, Donald J.	C-82702	Condemned - Grade A	NS-18-S

A. Describe Problem: The Lethal Injection Procedure As Used in California Violates my Eighth Amendment Rights. Please see attached page.

If you need more space, attach one additional sheet.

B. Action Requested: If the State is going to execute me, they must fix the procedure by which they do lethal injection to make certain I will not suffer unnecessary pain and suffering.

Inmate/Parolee Signature: Donald J. Beardslee Date Submitted: 11-24-04

C. INFORMAL LEVEL (Date Received: _____)

NOV 29 RECD

Staff Response:

Bypass

Staff Signature: _____ Date Returned to Inmate: _____

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Pursuant to 15 Cal. Code Regs. §3084.7, I am filing this complaint as an EMERGENCY APPEAL and have not sought review at the Informal Level. I am doing so because I may have an execution date as soon as early January. I do not have a stay of execution in place.

Signature: Donald J. Beardslee Date Submitted: 11-24-04

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

ER 643

First Level ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

E. REVIEWER'S ACTION (Complete within 15 working days): Date assigned: Due Date:

Interviewed by:

Bypass

Staff Signature: Title: Date Completed:
Division Head Approved: Returned:
Signature: Title: Date to Inmate:

F. If dissatisfied, explain reasons for requesting a Second Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

Bypass

Signature: Date Submitted:

Second Level ☐ Granted ☐ P. Granted ☒ Denied ☐ Other

G. REVIEWER'S ACTION (Complete within 10 working days): Date assigned: NOV 29 2004 Due Date: DEC 6 2004 JAN 10 2005

☐ See Attached Letter

Signature: W Lehman CC II Date Completed: 12-06-04

Warden/Superintendent Signature: [illegible] Date Returned to Inmate: DEC 08 2004

H. If dissatisfied, add date or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Although my concerns about the lethal injection procedure have been further observed recently, the Second Level response does not address the issues raised by my Eighth Amendment and First Amendment claims. For additional support for my claims, please see the enclosed exhibit.

Signature: Donald J. Beaudreau Date Submitted: 12-07-04

For the Director's Review, submit all documents to: Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

DIRECTOR'S ACTION: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other
☐ See Attached Letter

CDC 602 (12/87)

Date:

ER
644

Beardslee statement for Form 602.

Describe Problem

1. The Lethal Injection Procedure As Used in California Violates my Eighth Amendment Rights

I have done a lot of reading on the subject of problems occurring during lethal injection executions in California and around the country. In light of the problems that I have read about, and in light of the fact that I have no information on the qualifications or background of the people who will be performing my execution, I have grave concerns that I will not be properly sedated when potassium chloride is administered to stop my heart and kill me. I have been told that potassium chloride will cause me to feel excruciating pain as if my veins were burning. I have also been told that the 2nd drug, pancuronium bromide, will cause me to suffocate if I am not properly sedated by the first drug. Most importantly, I have been informed that other people executed in both California and other states were probably conscious during their executions.

I believe that there is a serious risk that I will be conscious when the 2nd and 3rd drugs are given to me, and that I will feel extreme pain as a result. This violates my rights under the Eighth Amendment to be free from cruel and unusual punishment. If the State is going to kill me, it must do so without the serious risk of unnecessary pain.

BR
645

STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM
CDC 602 (12/87)

Location: Institution/Parole Region Log No. Category
1: 1:
2: 2:

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
Donald Beardslee	C-82702	North Seg.	WS-18-S

A. Describe Problem: The Use of Pancuronium Bromide Violates My First Amendment Rights
Please see attached page.

If you need more space, attach one additional sheet.

B. Action Requested: If I am executed, I request that pancuronium (or any other paralyzing neurotoxin or substance causing a similar effect) not be administered.

Inmate/Parolee Signature: Donald S. Beardslee Date Submitted: 11-24-04

C. INFORMAL LEVEL (Date Received:)

Staff Response:

Staff Signature: Date Returned to Inmate:

D. FORMAL LEVEL
If you are dissatisfied, explain below, attach supporting documents [Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.] and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Pursuant to 15 Cal. Code Regs. §3084.7, I am filing this complaint as an Emergency Appeal and have not sought review at the Informal Level. I am doing so because I may have an execution date as soon as early January. I do not have a stay of execution in place.

Signature: Date Submitted:

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

ER
646

The Use of Pancuronium Bromide Violates My First Amendment Rights. In light of the problems that I have read about occuring in lethal injections in California and around the country, and in light of the fact that I have no information on the qualifications or background of the people who will be performing my execution, I am concerned that I will not be properly anaesthetized when potassium chloride is administered to kill me. If that happens, I will experience horrible burning pain from the potassium chloride. Because the pancuronium bromide will paralyze me, I will be unable to communicate to anyone that I have not been properly anaesthetized and that I am being tortured.

If I am executed, and in the event that I have not been properly anaesthetized, I want to be able to communicate that fact and the fact that I am experiencing excruciating pain. I want to communicate this information so that the Warden, the Director of the Department of Corrections, the Governor, the Legislature, the public and those acting on behalf of other death row inmates can evaluate whether California's execution protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment.

I also want to communicate the information that the execution protocol failed in my case so that 1) the public can be educated about the lethal injection procedure's possibility for torturing the condemned, and 2) the Warden and the Director of the Department of Corrections can be alerted to the failure so that they can identify where the system broke down in order to ensure that the mistake is not repeated in future executions.

I have a First Amendment right to make these communications. The administration of pancuronium bromide is intended to prevent me from doing so.

The use of pancuronium bromide to prevent me from exercising my First Amendment rights is invalid under the standards set in Turner v. Safley, 482 U.S. 78, 87 (1987). Preventing me from communicating about Eighth Amendment violations or a malfunction in the execution process is not a legitimate penological goal. Additionally, pancuronium bromide will not cause my death; that is the function of the potassium chloride. The restriction on my communication is not content neutral because there would not be any communication if the execution procedure functions properly. If pancuronium bromide is administered, I will not have an alternative means of communicating about problems in my execution because I will be dead. Allowing me to communicate about problems in my execution will have no impact on this institution except to educate other death row inmates for challenging the lethal injection procedure. The question of available alternatives to pancuronium bromide is irrelevant because paralyzing me to prevent me from exercising my First Amendment rights is not a legitimate penological goal.

In California First Amendment Coalition v. Woodford, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) and California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002), the Northern District of California and the Ninth Circuit recognized that public discussion about execution procedures cannot occur if First Amendment rights are not protected in the process. My First Amendment rights must be protected so that, if necessary, I can contribute to this public debate.

ER 647

State of California Department of Corrections

Memorandum

Date: December 2, 2004

To: BEARDSLEE, C-82702
California State Prison, San Quentin

Subject: SECOND LEVEL APPEAL RESPONSE
LOG NO.: SQ 04-2953

ISSUE:

It is the appellant's position that the lethal injection procedure as used in California violates his Eighth Amendment Rights. The appellant states he has grave concerns that he will not be properly sedated when he is administered potassium chloride, the third in a series of three drugs utilized in the lethal injection procedure. The appellant contends he has been told that potassium chloride will cause him excruciating pain as if his veins were burning.

The appellant states he has also been told the second drug administered, pancuronium bromide, will cause him to suffocate if he is not properly sedated by the first drug.

The appellant contends he has been informed that other inmates executed in California and other states were (probably) conscious during their executions. The appellant complains there is a serious risk he will be conscious when the second and third drugs are administered, and as a result, he will feel extreme pain.

In the event the appellant does feel excruciating pain, he wants to communicate the information to the public that the execution protocol has failed so the public can be educated about the procedure's possibility of "torturing" him during the lethal injection procedure.

The appellant alleges the use of pancuronium bromide violates his First Amendment rights under the standard set in Turner vs. Saffley, 482 U.S. 78, 87 (1987). The appellant complains that preventing him from communicating his Eighth Amendment rights is a malfunction in the process and is not a legitimate penological goal.

The appellant requests on appeal that in the event he is not properly anaesthetized, he wants to be able to communicate that fact and that he is experiencing excruciating pain. He wants to communicate this fact to the Warden, to the Director of Corrections, the Governor and to the public and those acting on behalf of all other Death Row inmates.

The appellant additionally is concerned about the qualifications and experience of the people who will be performing the execution.

ER 648

INTERVIEWED BY: W. Jeppeson, Correctional Counselor II, Appeals Coordinator

REGULATIONS: The rule governing this issue is:

Article 7.5. Execution of Death Penalty

3349. Method of Execution:

(a) Inmates sentenced to death shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. Upon being served with the warrant of execution, the inmate shall be served with CDC Form 1801-B (4/98), Service of Execution Warrant, Warden's Initial Interview. The completed CDC Form 1801-B shall be transmitted to the warden.
(b) The inmate shall be notified of the opportunity for such selection and that, if the inmate does not choose either lethal gas or lethal injection within ten days after being served with the execution warrant, the penalty of death shall be imposed by lethal injection. The inmate's attestation to this service and notification shall be made in writing and witnesses utilizing the CDC Form 1801 (Rev. 4/98), Notification of Execution Date and Choice of Execution Method. The completed CDC Form 1801 shall be transmitted to the warden.
(c) The inmate's selection shall be made in writing and witnessed utilizing the CDC Form 1801-A (Rev. 4/98), Choice of Execution Method. The completed CDC Form 1801-A shall be transmitted to the warden.
(d) The inmate's selection shall be irrevocable, with the exception that, if the inmate sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the person again shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection, according to the procedures set forth in sections (b) and (c).

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 3604, Penal Code.

In review of the appellants appeal issues and the responses given, it is noted the appellant's issues have been appropriately addressed. On December 6, 2004, the appellant was interviewed by W. Jeppeson, Correctional Counselor II, Appeals Coordinator. At that interview the appellant was advised that any claims as to problems he perceives with California's lethal injection procedure are based solely upon his own information and belief. The appellant provides neither empirical evidence nor any scientific study that would support his claims.

Per Steven S. Lubiner, the appellant's attorney, the appellant will not be selecting a method of execution. Should the appellant not select a method of execution within ten (10) days after service of an execution warrant, California law provides that the penalty of death shall be imposed by lethal injection (see Penal Code Section 3604 (b)).

BR
649

Based on the submitted documentation from the appellant, as well as the conducted interview, and a thorough review of the appellant's appeal issues by this reviewer, the findings are the appellant's issues have been appropriately addressed and duly responded to. This reviewer finding is the appellant's contentions are without merit.

DECISION: The appeal is denied.

The appellant is advised that this issue may be submitted for a Director's Level of Review if desired.

JILL L. BROWN, WARDEN
California State Prison, San Quentin

BR
650

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
INMATE APPEALS BRANCH
P. O. BOX 942883
SACRAMENTO, CA 94283-0001

DIRECTOR'S LEVEL APPEAL DECISION

Date: DEC 1 4 2004 EMERGENCY

In re: Boardsice, C-82702
California State Prison, San Quentin
San Quentin, CA 94964

IAB Case No.: 0405819 Local Log No.: SQ 04-2953

This matter was reviewed on behalf of the Director of the California Department of Corrections (CDC) by Appeals Examiner K. Allen, Staff Services Manager I. All submitted documentation and supporting arguments of the parties have been considered.

I APPELLANT'S ARGUMENT: It is the appellant's position that the lethal injection procedure as used in California violates his constitutional rights. The appellant states that the use of the sedative potassium chloride will cause him excruciating pain as if his veins were burning, thus constituting cruel and unusual punishment. The appellant states that he has read a lot of different articles on the subject that support his claim. In the event the appellant does feel excruciating pain, he desires to communicate this information to Departmental staff and the public, so that it can benefit future death row inmates. The appellant also alleges that the use of pancuronium bromide violates his First Amendment rights under the set in Turner vs. Safley, 482 United States 78, 87 (1987). The appellant complains that preventing him from communicating his rights is a malfunction in the process and is not a legitimate penological goal. The appellant requests that if he is executed, that the Department must fix the procedure by which they do lethal injection to make certain he will not suffer unnecessary pain and suffering.

II SECOND LEVEL'S DECISION: The reviewer found that pursuant to the California Code of Regulations, Title 15, Section (CCR) 3349, the appellant has the opportunity to elect to have the punishment imposed by either lethal gas or lethal injection. If the appellant has serious concerns about the "perceived potential" of pain and suffering from lethal injection, he can choose lethal gas. The appellant was also informed that his claims as to the problems he perceives with California's lethal injection procedure are based solely upon his own information and belief. The appellant provided neither empirical evidence nor any scientific study that would support his claims. The appeal was denied at the Second Level of Review (SLR).

III DIRECTOR'S LEVEL DECISION: Appeal is denied.

A. FINDINGS: The SLR has properly reviewed and considered the appellant's appeal issues. The appellant has failed to provide any substantive evidence that would lend credibility to his claim that he will feel excruciating pain by the method of execution utilized by the State of California. The appellant's sentence and penalty were established by court in California; therefore, relief at the Director's Level of Review cannot be afforded the appellant.

B. BASIS FOR THE DECISION:
California Penal Code Section: 3604, 5058
CCR: 3004, 3349

C. ORDER: No changes or modifications are required by the institution.

This decision exhausts the administrative remedy available to the appellant within CDC.

N. GRANNIS, Chief
Inmate Appeals Branch

cc: Warden, SQ
Appeals Coordinator, SQ

BR
651

Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
Phone: (707) 789-0516
Fax: (707) 789-0515
Email: sslubliner@comcast.net

Law Offices of Steven S. Lubliner

Fax

To:	Chief, Inmate Appeals, CDC	**From:**	Steven S. Lubliner
Fax:	(916) 358-2410	**Date:**	October 29, 2004
Phone:	(916) 358-2417	**Pages:**	18
Re:	Beardslee/602 third level review.	**CC:**	

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

•Comments:

Attached is death row inmate Donald Beardslee's request for third level review of his Eighth and First Amendment challenges to California's lethal injection procedure. This is being handled as an emergency appeal. As you will see, the 602 form for Mr. Beardslee's First Amendment claim was immediately returned to him. However, the Warden responded to both claims on the 602 with the Eighth Amendment claim.

I will mail the originals tonight. I note, however, that officials at San Quentin had offered to fax these forms to you to begin Mr. Beardslee's third level review.

As a courtesy, I would appreciate it if you would fax me a copy of the Director's decision at the same time you inform Mr. Beardslee.

Thank you,

Steven S. Lubliner

BR 692

Exh V

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM

CDC 602 (12/87)

Location: Institution/Parole Region 1. SQ 2. _____ Log No. 1. 04-2953 2. _____ Category 10

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
BEARDSLEE, Donald J.	C-82702	Condemned - Grade A	NS-18-S

A. Describe Problem: The Lethal Injection Procedure As Used in California Violates my Eighth Amendment Rights. Please see attached page.

If you need more space, attach one additional sheet.

B. Action Requested: If the State is going to execute me, they must fix the procedure by which they do lethal injection to make certain I will not suffer unnecessary pain and suffering.

Inmate/Parolee Signature: Donald J. Beardslee Date Submitted: 11-24-04

C. INFORMAL LEVEL (Date Received: _____)

NOV 29 RECD

Staff Response:

Bypass

Staff Signature: _____ Date Returned to Inmate: _____

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Pursuant to 15 Cal. Code Regs. §3084.7, I am filing this complaint as an EMERGENCY APPEAL and have not sought review at the Informal Level. I am doing so because I may have an execution date as soon as early January. I do not have a stay of execution in place.

Signature: Donald J. Beardslee Date Submitted: 11-24-04

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number: ER 693

V-2

First Level ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

E. REVIEWER'S ACTION (Complete within 15 working days): Date assigned: Due Date:

Interviewed by:

Bypass

Staff Signature: Title: Date Completed:

Division Head Approved: Returned

Signature: Title: Date to Inmate:

F. If dissatisfied, explain reasons for requesting a Second-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

Bypass

Signature: Date Submitted:

Second Level ☐ Granted ☐ P. Granted ☒ Denied ☐ Other

G. REVIEWER'S ACTION (Complete within 10 working days): Date assigned: NOV 29 2004 Due Date: ~~DEC 27 2004~~ JAN 10 2005

☐ See Attached Letter

Signature: W Lepper CCII Date Completed: 12-06-04

Warden/Superintendent Signature: J W Patton Date Returned to Inmate: DEC 06 RECD

H. If dissatisfied, add data or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Although my concerns about the lethal injection procedure have been written about extensively, the Second Level response does not address the issues raised by my Eighth Amendment and First Amendment claims. For additional support for my claims, please see the enclosed material.

Signature: Donald J. Beaudreaux Date Submitted: 12-08-04

For the Director's Review, submit all documents to: Director of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001
Attn: Chief, Inmate Appeals

BR 694

DIRECTOR'S ACTION: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

☐ See Attached Letter

Date:

CDC 602 (12/87)

V-3

Beardslee statement for Form 602.

Describe Problem

1. The Lethal Injection Procedure As Used in California Violates my Eighth Amendment Rights

I have done a lot of reading on the subject of problems occurring during lethal injection executions in California and around the country. In light of the problems that I have read about, and in light of the fact that I have no information on the qualifications or background of the people who will be performing my execution, I have grave concerns that I will not be properly sedated when potassium chloride is administered to stop my heart and kill me. I have been told that potassium chloride will cause me to feel excruciating pain as if my veins were burning. I have also been told that the 2nd drug, pancuronium bromide, will cause me to suffocate if I am not properly sedated by the first drug. Most importantly, I have been informed that other people executed in both California and other states were probably conscious during their executions.

I believe that there is a serious risk that I will be conscious when the 2nd and 3rd drugs are given to me, and that I will feel extreme pain as a result. This violates my rights under the Eighth Amendment to be free from cruel and unusual punishment. If the State is going to kill me, it must do so without the serious risk of unnecessary pain.

ER
699

V-4

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

INMATE/PAROLEE APPEAL FORM

CDC 602 (12/87)

Location: Institution/Parole Region 1. _____ 2. _____ Log No. 1. _____ 2. _____ Category _____

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
BEARDSLEE, Donald J.	C-82702	Condemned - Grade A	NS-18-S

A. Describe Problem: The Use of Pancuronium Bromide Violates My First Amendment Rights. Please see attached page.

If you need more space, attach one additional sheet.

B. Action Requested: If I am executed, I request that Pancuronium Bromide (or any other paralyzing neurotoxin or substance causing a similar effect) not be administered.

Inmate/Parolee Signature: Donald J. Beardslee Date Submitted: 11-24-04

C. INFORMAL LEVEL (Date Received: 11-29-4)

NOV 29 RECD

Staff Response: The drugs administered are a part of the lethal injection procedure and as such will be addressed on the appeal pertaining to the procedures. You will receive an assignment notice via mail

Staff Signature: K Egan for Facendo Date Returned to Inmate: 11-29-4

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Pursuant to 15 Cal. Code Regs. §3084.7, I am filing this complaint as an EMERGENCY APPEAL and have not sought review at the Informal Level. I am doing so because I may have an execution date as soon as early January. I do not have a stay of execution in place.

Signature: Donald J. Beardslee Date Submitted: 11-24-04

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:

EA 656

V-5

The Use of Pancuronium Bromide Violates My First Amendment Rights. In light of the problems that I have read about occurring in lethal injections in California and around the country, and in light of the fact that I have no information on the qualifications or background of the people who will be performing my execution, I am concerned that I will not be properly anaesthetized when potassium chloride is administered to kill me. If that happens, I will experience horrible burning pain from the potassium chloride. Because the pancuronium bromide will paralyze me, I will be unable to communicate to anyone that I have not been properly anaesthetized and that I am being tortured.

If I am executed, and in the event that I have not been properly anaesthetized, I want to be able to communicate that fact and the fact that I am experiencing excruciating pain. I want to communicate this information so that the Warden, the Director of the Department of Corrections, the Governor, the Legislature, the public and those acting on behalf of other death row inmates can evaluate whether California's execution protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment.

I also want to communicate the information that the execution protocol failed in my case so that 1) the public can be educated about the lethal injection procedure's possibility for torturing the condemned, and 2) the Warden and the Director of the Department of Corrections can be alerted to the failure so that they can identify where the system broke down in order to ensure that the mistake is not repeated in future executions.

I have a First Amendment right to make these communications. The administration of pancuronium bromide is intended to prevent me from doing so.

The use of pancuronium bromide to prevent me from exercising my First Amendment rights is invalid under the standards set in Turner v. Saffley, 482 U.S. 78, 87 (1987). Preventing me from communicating about Eighth Amendment violations or a malfunction in the execution process is not a legitimate penological goal. Additionally, pancuronium bromide will not cause my death; that is the function of the potassium chloride. The restriction on my communication is not content neutral because there would not be any communication if the execution procedure functions properly. If pancuronium bromide is administered, I will not have an alternative means of communicating about problems in my execution because I will be dead. Allowing me to communicate about problems in my execution will have no impact on this institution except to educate other death row inmates for challenging the lethal injection procedure. The question of available alternatives to pancuronium bromide is irrelevant because paralyzing me to prevent me from exercising my First Amendment rights is not a legitimate penological goal.

In California First Amendment Coalition v. Woodford, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) and California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002), the Northern District of California and the Ninth Circuit recognized that public discussion about execution procedures cannot occur if First Amendment rights are not protected in the process. My First Amendment rights must be protected so that, if necessary, I can contribute to this public debate.

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State of California

Department of Corrections

Memorandum

Date: December 2, 2004

To: BEARDSLEE, C-82702
California State Prison, San Quentin

Subject: SECOND LEVEL APPEAL RESPONSE
LOG NO.: SQ 04-2953

ISSUE:

It is the appellant's position that the lethal injection procedure as used in California violates his Eighth Amendment Rights. The appellant states he has grave concerns that he will not be properly sedated when he is administered potassium chloride, the third in a series of three drugs utilized in the lethal injection procedure. The appellant contends he has been told that potassium chloride will cause him excruciating pain as if his veins were burning.

The appellant states he has also been told the second drug administered, pancuronium bromide, will cause him to suffocate if he is not properly sedated by the first drug.

The appellant contends he has been informed that other inmates executed in California and other states were (probably) conscious during their executions. The appellant complains there is a serious risk he will be conscious when the second and third drugs are administered, and as a result, he will feel extreme pain.

In the event the appellant does feel excruciating pain, he wants to communicate the information to the public that the execution protocol has failed so the public can be educated about the procedure's possibility of "torturing" him during the lethal injection procedure.

The appellant alleges the use of pancuronium bromide violates his First Amendment rights under the standard set in Turner vs. Saffley, 482 U.S. 78, 87 (1987). The appellant complains that preventing him from communicating his Eighth Amendment rights is a malfunction in the process and is not a legitimate penological goal.

The appellant requests on appeal that in the event he is not properly anaesthetized, he wants to be able to communicate that fact and that he is experiencing excruciating pain. He wants to communicate this fact to the Warden, to the Director of Corrections, the Governor and to the public and those acting on behalf of all other Death Row inmates.

The appellant additionally is concerned about the qualifications and experience of the people who will be performing the execution.

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INTERVIEWED BY: W. Jeppeson, Correctional Counselor II, Appeals Coordinator

REGULATIONS: The rule governing this issue is:

Article 7.5. Execution of Death Penalty

3349. Method of Execution:

(a) Inmates sentenced to death shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. Upon being served with the warrant of execution, the inmate shall be served with CDC Form 1801-B (4/98), Service of Execution Warrant, Warden's Initial Interview. The completed CDC Form 1801-B shall be transmitted to the warden.
(b) The inmate shall be notified of the opportunity for such selection and that, if the inmate does not choose either lethal gas or lethal injection within ten days after being served with the execution warrant, the penalty of death shall be imposed by lethal injection. The inmate's attestation to this service and notification shall be made in writing and witnesses utilizing the CDC Form 1801 (Rev. 4/98), Notification of Execution Date and Choice of Execution Method. The completed CDC Form 1801 shall be transmitted to the warden.
(c) The inmate's selection shall be made in writing and witnessed utilizing the CDC Form 1801-A (Rev. 4/98), Choice of Execution Method. The completed CDC Form 1801-A shall be transmitted to the warden.
(d) The inmate's selection shall be irrevocable, with the exception that, if the inmate sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the person again shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection, according to the procedures set forth in sections (b) and (c).

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 3604, Penal Code.

In review of the appellants appeal issues and the responses given, it is noted the appellant's issues have been appropriately addressed. On December 6, 2004, the appellant was interviewed by W. Jeppeson, Correctional Counselor II, Appeals Coordinator. At that interview the appellant was advised that any claims as to problems he perceives with California's lethal injection procedure are based solely upon his own information and belief. The appellant provides neither empirical evidence nor any scientific study that would support his claims.

Per Steven S. Lubiner, the appellant's attorney, the appellant will not be selecting a method of execution. Should the appellant not select a method of execution within ten (10) days after service of an execution warrant, California law provides that the penalty of death shall be imposed by lethal injection (see Penal Code Section 3604 (b)).

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Based on the submitted documentation from the appellant, as well as the conducted interview, and a thorough review of the appellant's appeal issues by this reviewer, the findings are the appellant's issues have been appropriately addressed and duly responded to. This reviewer finding is the appellant's contentions are without merit.

DECISION: The appeal is denied.

The appellant is advised that this issue may be submitted for a Director's Level of Review if desired.

Jill L Brown

JILL L. BROWN, WARDEN
California State Prison, San Quentin

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Posted on Fri, Aug. 13, 2004

Suit filed against Kentucky's method of lethal injection

By Bill Estep
HERALD-LEADER STAFF WRITER

FRANKFORT — Kentucky's method of executing prisoners by lethal injection is flawed, in part because it will probably cause horrific pain to the condemned, and it should be declared unconstitutional, the state Department of Public Advocacy is arguing in a lawsuit.

DPA attorneys filed the lawsuit this week on behalf of Thomas Clyde Bowling, convicted of killing a young Lexington couple and wounding their son; and Ralph Baze of Powell County, who shot and killed two police officers.

The suit in Franklin Circuit Court seeks court orders barring the state from using its current method of lethal injection on the two.

The state adopted lethal injection in 1998 in order to phase out use of the electric chair.

It has used chemical injection only once, executing Eddie Lee Harper of Louisville in May 1999 after he dropped his appeals and asked to have his death sentence carried out because he didn't want to spend more years in prison.

The lawsuit argues Harper's execution showed the potential for problems with the state's current method of injecting three chemicals.

An autopsy showed the level of an anesthetic in Harper's bloodstream was low, meaning there was a probability of at least 67 percent he was conscious and suffered terror and tremendous pain as another drug designed to stop his heart "seared through his body," the lawsuit said.

Attorneys for Bowling and Baze filed the suit now because the two are near the end of their court appeals.

The U.S. Supreme Court will probably decide by early October whether to review Bowling's case, according to the suit. If the high court denies review, that would end Bowling's court appeals process, and Gov. Ernie Fletcher could schedule his execution before the end of the year.

Baze's case is one step behind, at the U.S. 6th Circuit Court of Appeals.

The two Death Row inmates' lawsuit is the first challenge to lethal injection in Kentucky. The lawsuit also seeks to have execution in the electric chair declared unconstitutionally cruel because of the potential for excruciating pain and other problems, including "occasionally exploding body parts."

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The challenge to electrocution was necessary because when legislators approved the use of injection, they said inmates sentenced to death earlier -- including Baze and Bowling -- could choose either the chair or injection.

There are 33 men and one woman under death sentences in Kentucky.

The state has not responded to the lawsuit. Attorney General Greg Stumbo said through spokeswoman Vicki Glass that courts have upheld the legality of both the electric chair and lethal injection and that he was confident the court in Kentucky would as well.

Jonathan Rees, commissioner of the state Department of Corrections, said he could not comment because of the pending litigation, said Lisa Lamb, spokeswoman for the department.

The defendants in the lawsuit are Rees; Glenn Haeberlin, warden at the Kentucky State Penitentiary, where executions are carried out; and unknown executioners.

Part of the challenge by Bowling and Baze is based on the chemicals Kentucky plans to use in a lethal injection and the way they are administered.

The procedure used on Harper is still in place. It involves first injecting the condemned person with two grams of sodium pentothal, also called thiopental, a short-acting barbiturate designed to render the person unconscious.

Then comes saline to clear the injection tubes; pancurium bromide, also called pavulon, which the suit said paralyzes muscles but does not affect awareness; saline again; and finally potassium chloride, a chemical to stop the heart. The process is automated once the executioner starts it.

The process violates state law because the chemicals are injected in rapid succession, not in a "continuous administration" as the law calls for, the suit said.

That is important because the thiopental wears off quickly, and also because 2 grams of the drug is a low dose. That is complicated by the use of pavulon, administered to make sure the condemned person doesn't thrash about, and potassium chloride, which causes an extremely painful burning sensation, the lawsuit said.

Taken together, Kentucky's method of lethal injection is likely to leave an inmate conscious during much of the execution, in agony from the feeling of suffocation and seared nerves and yet unable to move or cry out, the lawsuit said.

That is probably what happened in Harper's case, because either the first drug wore off or not enough reached his bloodstream, the lawsuit said.

The chemicals also can spark a reaction that would cause the condemned man to silently choke to death on vomit. That is a particular concern with Baze, because he has a stomach condition, the suit said.

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FROM: TALK Magazine [Oc_ 2001, page 86-86]

DEAD MAN WALKING
BY: Bruce Shapiro

Federal Authorities insist that Timothy McVeigh died a dignified death. But a respected Neuroscientist believes McVeigh may have been slowly tortured behind a chemical veil.

Is it possible Timothy McVeigh was fully alert and utterly sentient when POTASSIUM CHLORIDE shot through his leg and stopped his heart? The tear witnesses saw well up in his left eye suggests that he might have been very conscious as Lethal Drugs Burned his veins, took his breath and seized his heart. There are lots of people who hope so. But Mark Heath is not one of them. "It gave me the creeps," Heath, an Anestnesiologist and Neuroscientist at Columbia Presbyterian Medical Center in New York, says of the tear. "It is a classic sign of an anesthetized patient being awake." Heath found it disturbing to think that the Federal Government would torture McVeigh and other citizens it puts to death.

In fact LETHAL INJECTION has become the EXECUTION METHOD of choice in most jurisdictions precisely because it seems to induce a more dignified dispatch than either the Electric Chair or Gas Chamber. The idea is to "Show respect and dignity for everyone involved," says Federal Bureau of Prisons spokesman Dan Dunne. Toward this end a sedative, SODIUM THIOPENTAL, or PENTOTHAL, is pumped into the condemned prisoner's blood stream, rendering him or her unconscious. PANCURONIUM BROMIDE then paralyzes the muscles. Finally POTASSIUM CHLORIDE stops the heart. Through the final steps the dying prisoner is supposed to stay unconscious.

Prompted by reports of McVeigh's tear, however, Heath cast a clinical eye on this "Sequence of Execution Drugs". He did not like what he saw. For one thing he was puzzled by the choice of sedative. "Sodium Thiopental," says Heath, "is an ultra-short-acting barbiturate, and we use it all the time in the operating room. There's a lot of room for error, and a lot of room for someone to wake up." Instants of patients waking up during surgery are well documented, he points out.

But what really disturbed Heath was the use of the second drug, PANCURONIUM BROMIDE. It is not, Heath realized, strictly necessary for the execution. Instead it paralyzes the condemned inmate so thoroughly "That he looks peaceful and relaxed no matter what he is experiencing." An inmate could awaken midexecution and find himself "In incredible pain as the POTASSIUM is injected, and even worse, fully aware of suffocation as his lungs fill with fluid, -- and yet witnesses would get no indication that anything like this was taking place. To Heath this means just one thing: PANCURONIUM is administered primarily "So witnesses do not need to look at something unpleasant." The drug is "A chemical veil," says Heath. "It's like the leather mask they use to put over the faces of people in the electric chair, except it masks what is happening to the whole body. And you can't see that it is there."

Heath -- who previously had been, in his words, "Ambivalent" about the death penalty -- began calling Federal Prison officials to learn more about what scientists call the "Protocol for Execution Drugs". His findings alarmed him as much as the drugs themselves: the "Guidelines for Letnal Injection", he was told, are a closely guarded secret, a startling fact confirmed by Bureau of Prisons spokesman Dunne. "We really don't make it available," Dunne says. The Bureau of Prisons will not say how much of

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each drug is used or w_ther the injection is ad_ministered by MACHINE or directly by HUMAN EXECUTIONERS. "We just don't provide those details."

"The secrecy," Dunne claims, "is necessary to protect the privacy of everyone involved," -- even though the effect is to Mask Objective Assessment of the Federal Government's Execution Methods as thoroughly as PANCURONIUM can obscure a dying inmate's agony.

The advent of Lethal Injection is itself a strange story involving politics, scant science and more than a little fraud. As long ago as 1973 Ronald Reagan, then Governor of California, speculated that a "Simple Shot or Tranquilizer" might make Capital Punishment more palatable to uneasy judges and the public. "Being a former farmer and horse raiser, I know what it's like to try to eliminate an injured horse by shooting him," Reagan said. Four years later Oklanoma passed the first Lethal Injection Bill after one Legislator received a single endorsement of the proposal from and Anesthesiologist. Soon one state Legislature after another made Lethal Injection their Execution Method choice.

The STICKY PROBLEM of how the process ought to work was left up to Prison Wardens, who often sought help from "Veterinarians", the nearest stand-ins for doctors; Whose Hippocratic oath prohibits giving advise on killing. In 1982 a New Jersey Dentist in the State Assembly sponsored a law specifying the combination of BARBITURATE and PARALYTIC agents. To concoct the precise formulation, New Jersey and then Missouri called upon Fred Leuchter, who advertised himself as an engineer with execution expertise. Leuchter is also a Notorious Holocaust Revisionist and the subject of a 1999 documentary, 'Dr. DEATH'. Leuchter tells "TALK" that he constructed a device to deliver the drugs and that he came up with the formula after he'd examined medical studies on rabbits and pigs, and "Extrapolated from there." After a 1991 lawsuit exposing him as a CHARLATON, Leuchter left the Execution Consulting Business, but the recipe he formulated for New Jersey and Missouri may well have been adopted by other states [California?].

The Bureau of Prisons will not say whether it too relies on Leuchter's recipe, but Leuchter himself believes the Federal Execution Protocol is based on his work. Curiously, Leuchter agrees with part of Heath's assessment: "Timothy McVeigh's execution," Leuchter claims, "took longer than it should have," leaving open the possibility that McVeigh was awake during his final minutes.

If McVeigh was indeed awake during his execution, it would not be the first time a Lethal Injection went awry. Indeed, some Lethal Injection scenes can only be described as "Horrendous". Stephen McCoy began heaving and shaking and gasping during his execution in Texas in 1989, a reaction so violent that one witness fainted. In Illinois in 1990, a kink in IV tubing slowed the flow of drugs into Charles Walker, leaving him in prolonged and excruciating pain. In Missouri in 1995 Emmitt Foster was seven minutes into his Lethal Injection when the chemicals abruptly stopped working. Foster gasped and convulsed; Officials stopped the execution and drew blinds, blocking witnesses' view. And in June 2000 Bert Leroy Hunter of Missouri went into repeated and violent convulsions, his head and body jerking back and forth against his restraints in what one witness called "A Violent and Agonizing Death."

Heath isn't the only scientist to have raised questions about the drugs used for Lethal Injection. "It's obvious to any Anesthesiologist who looks

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into it that it's not good protocol," he says. But his contention that PANCURONIUM works to FOOL WITNESSES, REPORTERS and even JUDGES into believing that execution is peaceful, "Just like going to sleep," as witnesses often report -- has never been brought before a Federal Appeals Court. Indeed, though several State Courts have upheld Lethal Injection, no Federal Appellate Court has ever addressed the question of whether today's favored execution method constitutes CRUEL and UNUSUAL PUNISHMENT. (McVeigh's lawyers might have raised the issue had the Oklahoma City Bomber abandoned his appeals.)

McVeigh's, the first Federal Execution in 38 years, signals a new season of DEATH and CONTROVERSY. At a time when public support for the Death Penalty has eroded (polls show support for Capital Punishment has dropped 15% in the past seven years), Heath's questions could spark renewed debate. Heath has filled a Freedom of Information Act request with the Bureau of Prisons, hoping for more details about the Federal Government's Lethal Injections. He is not interested, he says, in designing a better mousetrap. Rather, he wants to show what he has come to see as 'Insidiousness' in an Execution System that claims to be humane but that disguises a dying inmate's agony from witnesses and the public. The question of whether Lethal Injection is Cruel and Unusual Punishment 'PROHIBITED' by the Eighth Amendment and whether it gives rise to 'Indescribably Agonizing Death' or 'Torture' prohibited under 'International Treaties and Conventions' is of more than passing interest to the 19 inmates currently on Federal Death Row. When the issue is raised in Federal Court, which it no doubt will be, Heath predicts that the CHEMICAL VEIL drawn over execution by PANCURONIUM will prove central: Judges, [this scientist is convinced], "Have not realized how the Very Process of Execution Can Cover Up the Evidence of Cruelty."

Note: This is a copy of someone else's copy of this article.

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October 22, 2003

Dead is Dead

There is No Civilizing the Death Penalty

By CHRISTOPHER BRAUCHLI

> "Hanging was the worst use a man could be put to."
>
> Sir Henry Wotton,
> The Disparity Between Buckingham and Essex

The death penalty has once again made news. October 10 the European Union marked the first World Day Against the Death Penalty by calling for the worldwide abolition of the death penalty. The United States is in the company of, among others, Iran and Nigeria in using the death penalty to modify people's behavior. It is, of course, more civilized in its use than Nigeria so some may dislike lumping the two together. On the other hand, dead is dead.

The difference between the two countries was highlighted by Nigeria's Amina Lawal, a single mother sentenced to death for having had a baby out of wedlock. She was to be executed in a far less humane method than that employed in places such as Tennessee. She was to be buried up to her neck in sand and pelted with stones until dead. (Nigeria's highest court overturned her sentence not because it was inhumane but because she had not been observed when conceiving the child and was not given adequate time to understand the charges against her.)

Although stoning is not favored in the United States, a report in the New York Times on October 1 discloses that contrary to popular belief, people who are executed by lethal injection are not as happy as the drugs they are given cause them to appear.

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Lethal injection was introduced because death by gassing was considered unpleasant and resulted in occasional misbehavior by those being executed. The most notable case occurred in Arizona when the recipient of the gas made obscene gestures at the onlookers while dying, thus spoiling the event for the onlookers. Shortly thereafter Arizona switched to lethal injection. What we learned on October 7 is that lethal injection is not as pleasant as all but those having first hand acquaintance with it, thought.

People who have watched someone being killed by lethal injection have observed that those being sent on their way appear as tranquil as those in a hospital room whose lives are being preserved by the most modern techniques known to civilized people. That is in part because one part of the cocktail that is administered to the soon to be departed is the chemical, pancuronium bromide, known by the trade name, Pavulon.

Pavulon paralyzes the skeletal muscles but not the brain or nerves. Thus, people receiving it cannot move or speak nor can they let onlookers know that contrary to appearances, what is happening is no fun at all. A Tennessee judge, Ellen Hobbs Lyle, commenting on the use of the drug in an appeal brought by someone on death row in that state, said Pavulon has no "legitimate purposes." Writing about the drug's use she said: "The subject gives all the appearances of a serene expiration when actually the subject is feeling and perceiving the excruciatingly painful ordeal of death by lethal injection. The Pavulon gives a false impression of serenity to viewers, making punishment by death more palatable and acceptable to society."

Sherwin B. Nuland, a professor in the Yale medical school when told of use of the drug expressed surprise. He said: "It strikes me that it makes no sense to use a muscle relaxant in executing people. Complete muscle paralysis does not mean loss of pain sensation." He said, in effect, that there were other ways of humanely killing people. I'm sure he's right, but there are 28 states that use the same cocktail in the execution chamber as Tennessee. The first drug administered is sodium thiopental, used to induce anesthesia for a short period. It is followed by pancuronium bromide which paralyzes the patient and finally potassium chloride which stops the heart and is said to cause excruciating pain if the victim is conscious.

It would be easy to simply condemn Tennessee for being a state that lacks respect for human life. That would be a mistake. Tennessee has a law that is known as the "Nonlivestock Animal Humane Death Act."

Nonlivestock is defined to include pets, captured wildlife, exotic and domesticated animals, rabbits, chicks, ducks and potbellied pigs. Tennessee law says: "A nonlivestock animal may be tranquilized with an approved and humane substance before euthanasia is performed." The law then provides that "any substance which acts as a neuromuscular blocking agent, or any chamber which causes a change in body oxygen may not be used on any nonlivestock animal for the purpose of euthanasia.

The unfortunate things, as far as those facing the executioner's needle in Tennessee is concerned, is that humans are excluded from the definition of "nonlivestock animals." Thus, the requirement for a humane execution that is imposed on those killing animals, is not imposed on those killing humans. Tennessee is not alone in being more concerned about kind executions of nonlivestock animals than humans.

The American Veterinary Medical Association has come out against using the product when euthanizing animals when it is used alone or in combination with sodium pentobarbital. According to a 2000 report from the Association, "the animal may perceive pain and distress after it is immobilized." That might almost be enough to convince some people that what's good for the potbellied pig should be good for a human. On the other hand the potbellied pig is killed for what it is rather than what it did. That probably explains the more humane treatment.

Christopher Brauchli is a Boulder, Colorado lawyer. His column appears weekly in the **Daily Camera**. He can be reached at: brauchli.56@post.harvard.edu

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Doctors urged to stop patient wakefulness during surgeries

■ Panel' suggestions may lead to accreditation rules, on which federal money and prestige could hinge

By Lindsey Tanner
ASSOCIATED PRESS

CHICAGO — A medical accreditation group last week urged hospitals nationwide to take steps to prevent "anesthesia awareness" — instances in which patients wake up during surgery and sometimes feel excruciating pain without being able to cry out.

An estimated 20,000 to 40,000 patients wake up during general anesthesia each year and about one-quarter of them report feeling pain, the Joint Commission on Accreditation of Healthcare Organizations said in an alert sent to the 4,579 hospitals it monitors nationwide.

The sensation is described by some as being like "entombed in a corpse."

"Some patients describe these occurrences as their 'worst hospital experience,' and some determine to never again undergo surgery," JCAHO said.

Dr. Dennis O'Leary, the commission's president, said patients who might wake up during an operation should be warned, and all general anesthesia patients should be monitored and asked about any awareness during surgery. He said patients who suffer such an experience deserve an apology and should be offered counseling if needed.

"When a patient says, 'I was awake during surgery,' you don't laugh and blow them off" — which sometimes is the response, O'Leary said.

Carol Weihrer, who runs a patient advocacy group called the Anesthesia Awareness Campaign, said none of those actions were taken before or after a 1998 operation in which her diseased right eyeball was surgically removed.

"I felt the pulling and tugging and the pressure of the cutting while the surgeon was instructing the resident to cut deeper and pull harder," said Weihrer, 53, of Reston, Va.

Weihrer said she is delighted with JCAHO's alert.

"I'm hoping that the impact will be that this will finally come to a head in the professional community" and help prevent other cases, she said.

JCAHO's recommendations could eventually become accreditation requirements, O'Leary said. That would mean that hospitals that fail to act could risk losing accreditation, along with federal dollars and prestige.

Anesthesia awareness has been known to happen during some heart, emergency, obstetric and trauma operations, in which patients might be given too-low doses of anesthetic drugs.

Patients often do not become fully conscious but report hearing doctors' conversations or feeling unable to breathe. Because of the routine use of paralytic drugs during general anesthesia, patients often are unable to alert the surgeons.

Using shorter-acting intravenous drugs rather than inhaled anesthesia can lead to patients' gaining consciousness on the operating table. So can decreasing the drug dose too soon after surgery to get patients in and out of the operating room more quickly, JCAHO said.

Some doctors favor the shorter-acting IV anesthetics because they allow patients to become alert more quickly after an operation, with fewer side effects, said Dr. Asokumar Buvanendran, an anesthesiologist at Rush University Medical Center in Chicago.

Dr. Roger Litwiller, president of the American Society of Anesthesiologists, said JCAHO's alert will help raise awareness about the problem, which he called uncommon but still a concern.

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** E-filed 1/7/05 **

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Donald J. BEARDSLEE, Plaintiff, v. Jeanne S. WOODFORD, Director of the California Department of Corrections; Jill L. Brown, Warden of San Quentin State Prison; and Does 1-50, Defendants.	Case Number C 04 5381 JF DEATH-PENALTY CASE ORDER DENYING MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND FOR EXPEDITED DISCOVERY [Docket Nos. 2 & 8]

Plaintiff Donald J. Beardslee moves for a temporary restraining order or preliminary injunction and for expedited discovery. Defendants Jeanne S. Woodford, Director of the California Department of Corrections, and Jill L. Brown, Warden of San Quentin State Prison, oppose the motions. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on Thursday, January 6, 2005. For the reasons set forth below, the motions will be denied.

I. BACKGROUND

Plaintiff has been sentenced to death. He is scheduled to be executed by lethal injection just after midnight on Wednesday, January 19, 2005. On Monday, December 20, 2004, Plaintiff filed the present action pursuant to 42 U.S.C. § 1983 (2004). Plaintiff seeks injunctive relief to

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prevent Defendants from executing him pursuant to California's lethal injection protocol, contending that executions performed pursuant to that protocol violate the Eighth Amendment's prohibition of cruel and unusual punishment as well as his First Amendment right to freedom of speech.

II. LEGAL STANDARD

As a general rule, a party seeking a preliminary injunction must show either (1) a likelihood of success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. See Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998); Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. See Roe, 134 F.3d at 1402.

In the death penalty context,

> before granting a stay [of execution], a district court must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

Nelson v. Campbell, 541 U.S. 637, 124 S. Ct. 2117, 2126 (2004) (citations omitted).

III. DISCUSSION

Less than one year ago, another resident of California's death row, Kevin Cooper, faced imminent execution. Cooper filed an action in this Court in which he challenged the same lethal injection protocol that is at issue in the present case. This Court declined to stay the execution. The Court found that Cooper had delayed unduly in asserting his claims and that he had done no more than raise the possibility that he might suffer unnecessary pain if errors were made in the course of his execution. Cooper v. Rimmer, No. C 04 436 JF, 2004 WL 231325 (N.D. Cal. Feb.

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6, 2004) (Fogel, J.). The United States Court of Appeals for the Ninth Circuit affirmed for the same reasons. Cooper, 379 F.3d 1029 (2004).[1]

Now binding precedent, the Ninth Circuit's opinion in Cooper necessarily is the point of departure for this Court's analysis of Plaintiff's claims. Accordingly, the Court considers whether and to what extent Plaintiff's case is distinguishable from Cooper.

A. Undue Delay

While Cooper filed his action a mere eight days before he was due to be executed, Plaintiff filed the present action thirty days before his scheduled execution date. In addition, unlike Cooper, Plaintiff exhausted his administrative remedies before filing suit. The Court recognizes that the timing of Plaintiff's filing permits a somewhat more orderly judicial process than was possible in Cooper. Nonetheless, Plaintiff's commencement of this action so close to his execution date presents the same basic problem presented in Cooper, which is that litigation through trial is impossible unless the Court agrees to stay the pending execution. The record reflects that with one exception noted below virtually all of the evidence that Plaintiff proffers here became available while a stay of execution was in place so that Plaintiff could pursue his federal habeas corpus petition, long before December 20, 2004. As noted above, "there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Nelson, 124 S. Ct. at 2126. Like Cooper, Plaintiff waited until the State scheduled his execution date before filing suit. Thus, although Plaintiff has been somewhat more diligent than Cooper, he still must make a showing of serious questions going to the merits that is sufficient to overcome that strong presumption.[2]

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[1]In a separate habeas corpus proceeding originally brought in the Southern District of California, an en banc panel of the Ninth Circuit granted a stay of execution to permit Cooper to pursue his claim that he is innocent of the crimes of which he was convicted and for which he was sentenced to death. Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004) (en banc). This Court subsequently dismissed Cooper's challenge to the lethal injection protocol without prejudice in light of Cooper's failure to exhaust his administrative remedies. Cooper v. Woodford, No. C 04 436 JF (N.D. Cal. Oct. 12, 2004).

[2]Plaintiff filed his federal habeas petition in 1992, when California first adopted lethal injection as a method of execution. His petition contained a claim challenging lethal injection as cruel and unusual punishment. Defendants argue that the Court should not permit Plaintiff to relitigate this issue after

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B. Merits

As a general matter, Plaintiff's arguments and evidence are substantially the same as Cooper's. The differences are discussed below.[3]

Sodium pentothal is an anesthetic barbiturate sedative that also is known as thiopental sodium. It is the first drug of three that are administered under California's lethal injection protocol. Sodium pentothal is used to render the condemned inmate unconscious prior to the administration of pancuronium bromide (also known as Pavulon), a paralytic neuromuscular blocking agent, and potassium chloride, which induces cardiac arrest. The protocol calls for the administration of five grams of sodium pentothal, which the parties agree is a lethal dose if administered properly. Like Cooper, Plaintiff argues that it is possible that the sodium pentothal may not be administered properly, in which event he will experience excruciating pain as the other two drugs are administered.

In Cooper, the Ninth Circuit noted that Dr. Mark Dershwitz, a board-certified anesthesiologist on the faculty of the University of Massachusetts, had provided evidence to this Court that "over 99.999999999999% of the population would be unconscious within sixty seconds from the start of administration of this dosage of thiopental sodium" and that "this dose will cause virtually all persons to stop breathing within a minute of drug administration. Therefore . . . virtually every person given five grams of thiopental sodium will have stopped breathing prior to" the administration of pancuronium bromide. 379 F.3d at 1032. In the present

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having been unsuccessful in pursuing it on habeas. However, Plaintiff was apparently unable to develop the claim adequately because much of the evidence he proffers was unavailable when his claims were brought before the district court. Additionally, by the present action Plaintiff is challenging lethal injection as applied under the protocol adopted by the California Department of Corrections, while his habeas claim addressed the facial constitutionality of the State's lethal injection statute. His current claims thus are not identical to those asserted in his habeas petition. See Reid v. Johnson, 105 Fed. Appx. 500, 503 (4th Cir. 2004).

[3]There is one difference between Cooper and the present case that is immaterial for purposes of resolving the issue before the Court but nonetheless should be noted. In Cooper, the Ninth Circuit cited the statutes authorizing lethal injection in thirty-seven states. 379 F.3d at 1023 n.3. Since Cooper was decided, the statutes generally authorizing the death penalty in New York and Kansas have been held unconstitutional for procedural reasons by those states' highest courts. People v. LaValle, 817 N.E.2d 341(N.Y. 2004); State v. Marsh, No. 81,135, 2004 WL 2921994 (Kan. Dec. 17, 2004).

action, Plaintiff's expert, Dr. Mark Heath, expresses concern that the levels of sodium pentothal found in post-mortem blood toxicology reports of executed inmates obtained since the Cooper decision indicate that in some cases the sodium pentothal may have worn off prior to the administration of pancuronium bromide. However, these reports as such are insufficient to demonstrate any reasonable possibility that Plaintiff will be conscious at any point after he is injected with sodium pentothal. Reid v. Johnson, 333 F. Supp. 2d 543, 546-48 (E.D. Va.) (explaining lack of probative value of same reports even where only two grams of sodium pentothal is administered), stay of execution denied, 125 S. Ct. 25 (2004).[4]

Like Cooper, Plaintiff's challenge assumes that there is a risk that errors will be made in the course of his execution. However, the Ninth Circuit has held that "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." Campbell v. Wood, 18 F.3d 662, 667 (9th Cir. 1994).

Unlike Cooper, Plaintiff also asserts a First Amendment violation, arguing that the use of pancuronium bromide during the execution will make it impossible for him to cry out if he is not unconscious and therefore experiences pain and suffering as a result of the injection of pancuronium bromide and potassium chloride. Plaintiff makes the novel argument that the existence of any possibility of an error that would result in his being conscious yet unable to communicate under such circumstances is sufficient to establish a First Amendment violation.

As noted above, even with protocols under which only two grams of sodium pentothal—as opposed to the five grams used in California—are to be administered, the likelihood of such an error occurring "is so remote as to be nonexistent." Reid, 333 F. Supp. 2d at 551. Moreover, Plaintiff's First Amendment claim cannot be so easily separated from his Eighth Amendment claims. While Plaintiff plainly has a constitutional right to an execution that does not result in "unnecessary and wanton infliction of pain," Estelle v. Gamble, 429 U.S. 97, 103 (1976) (internal quotation marks and citations omitted), there is no authority for the proposition that he has a

[4]Notably, "[P]laintiff's expert, Dr. Heath, has conceded [in Reid] that with respect to the pharmacokinetics and pharmacodynamics of sodium thiopental, he defers to Dr. Dershwitz's expertise." 333 F. Supp. 2d at 547 n.7.

constitutional right to an execution free from any possibility of error. Put differently, in the context of an execution, a right to speak in essence is a right to claim that one's Eighth Amendment rights are being violated, and the risk of an accident is insufficient to constitute an Eighth Amendment violation. Campbell, 18 F3d. at 667.[5]

Thus, despite his additional legal theory and recently-obtained evidence, Plaintiff, like Cooper, has done no more than raise a concern that errors may be made during his execution that could expose him to a risk of unnecessary pain. Based upon the present record, a finding that there is a reasonable possibility that such errors will occur would not be supported by the evidence. Plaintiff's action thus is materially indistinguishable from Cooper. Like Cooper, Plaintiff has failed to demonstrate serious questions going to the merits; it follows that he has not overcome the "strong equitable presumption against the grant of a stay." Nelson, 124 S. Ct. at 2126, and is not entitled to injunctive relief.

IV. DISPOSITION

As this Court noted in Cooper, 2004 WL 231325, at *4, any case involving the death penalty inevitably raises serious moral, ethical, and legal questions about which people of good will continue to disagree. The present case, however, concerns the discrete question of whether Plaintiff has met the legal standard for enjoining California's lethal injection protocol for executions. Because the Court finds and concludes that Plaintiff has not met this standard and has delayed unduly in asserting his claims, and good cause therefor appearing, IT IS HEREBY ORDERED:

(1) Plaintiff's motion for a temporary restraining order or preliminary injunction is DENIED;

[5]To the extent that Plaintiff's First Amendment claim also involves the right of the public to witness the actual conditions and circumstances of his execution, including any pain and suffering that he might endure, that claim is substantially indistinguishable from arguments made by Cooper. 2004 WL 231325, at *2.

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(2) Plaintiff's motion for expedited discovery is DENIED as moot.

DATED: January 7, 2005

/s/electronic signature authorized
JEREMY FOGEL
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KEVIN COOPER, Plaintiff, vs. RICHARD A. RIMMER, et al., Defendants.

C-04-0436-JF

San Jose, CA
February 5, 2004

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: Orrick, Herrington & Sutcliffe LLP
Old Federal Reserve Bank Building
By: DAVID T. ALEXANDER, ESQ
400 Sansome Street
San Francisco, CA 94111-3143

For the Defendants: Office of the Attorney General
By: HOLLY D. WILKENS, DAG
110 West "A" Street
Suite 11000
San Diego, CA 92101

(APPEARANCES CONTINUED ON THE NEXT PAGE)

Court Reporter: PETER TORREANO, CSR
License Number C-7623

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APPEARANCES:
For the Defendants: Office of the Attorney General
By: DALE R. GILETTE, DAG
RONALD S. MATTHIAS, DAG
455 Golden Gate Avenue
Suite 11000
San Francisco, CA
94102-7004

San Jose, California February 5, 2004

PROCEEDINGS

THE COURT: At this time the Court will take up the matter of Cooper versus Rimmer. And would counsel state their appearances for the record, please.

MR. ALEXANDER: Good afternoon, Your Honor.

David Alexander of Orrick, Herrington & Sutcliffe on behalf of the Plaintiff Kevin Cooper.

MS. WILKENS: Good afternoon, Your Honor.

Holly Wilkens, Deputy Attorney General. Appearing with me today is Senior Assistant Attorney General Dane Gillette, Supervising Deputy Attorney General Ronald Matthias.

THE COURT: Thank you.

Counsel, thank you for your briefs. They were extraordinarily helpful and clear and I think have given the Court a great deal of help in dealing with this very difficult case.

Obviously a case of this kind when we have an imminent execution is about as important and serious a matter as a federal court will ever consider and it's also the type of issue about which there's a great deal of public interest and public feeling.

But the lawyers certainly know and I think the Court needs to emphasize that courts of law focus on legal issues. There is and will continue to be a very robust debate about the death penalty, about forms of execution, specifically a debate about Mr. Cooper's guilt or innocence.

But the issue before this Court and the only issue before this Court is whether Mr. Cooper has presented a constitutional challenge that has enough presumptive validity that it would justify enjoining a pending execution that has been ordered by the state courts and has been upheld at every level of federal review.

Counsel, what I would like to do is simply ask each side to make whatever comments it wishes to make in roughly 15 minutes or so. I have read your briefs and the exhibits very carefully. You don't need to repeat anything that's in there, but if you feel certain points require emphasis this would be your opportunity

to do that.

I probably will interrupt you to ask questions and I do that because it helps me understand better what you're saying and what your points are.

I know that time is absolutely of the essence here regardless of what the outcome of this hearing is. The party who does not prevail is going to want to and will appeal to the Ninth Circuit. That's going to need to happen in very short order. So I certainly don't intend to delay in any way in making a decision. If I don't do it this afternoon, it will be very early tomorrow morning.

So without any further ado I'd like to hear from Plaintiff and then I'll hear from the State.

May I have one moment, please.

MR. ALEXANDER: Yes, Your Honor.

THE COURT: Thank you very much.

Mr. Alexander?

MR. ALEXANDER: Thank you, Your Honor, and thank you for accommodating both sides on such short notice.

There are two fundamental principles of

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injunctive relief that are so well established that neither party even addressed them, but I was encouraged to hear Your Honor's opening comments because we believe that is precisely what Your Honor's responsibility is, to apply the law, to ignore the emotion that may exist.

The purpose of injunctive relief, whether it is a temporary restraining order or a preliminary injunction, is to maintain the status quo, don't change, leave things where they are. The crucial question is whether preservation of the status quo is necessary in order to protect the Court's ability to render a meaningful decision on the merits.

If a failure to grant temporary relief will allow the Defendant to harm the Plaintiff in such a way that the Court's ultimate decision in the Plaintiff's favor becomes mere useless dicta, then a temporary restraining order or a preliminary injunction should issue.

THE COURT: Well, Mr. Alexander, why don't I start there because the State, of course, in its opposition has raised the issue of delay. We clearly are in a situation where no one can quibble with what you've said, that if the Court

doesn't grant some type of injunctive relief then -- and some other court doesn't intervene, then Mr. Cooper will be executed and this case will have no purpose really.

But we're in that situation because this challenge has been raised so late. You've provided an explanation as to why at least some of the delay occurred, but just as a matter of judicial administration in the matter of taking up issues of this magnitude, the fact is that Mr. Cooper was sentenced to death 13 years ago, 12 or 13 years ago, that lethal injection has been the intended method of execution in this case since 1996. The protocol has not changed so far as I can tell from the record.

It would seem that at any time during this -- the last eight years that this challenge could have been raised. Now, it wasn't, but if it had been raised even three months ago, the Court could have granted expedited discovery, it could have granted expedited hearings, it could have done a lot of things in order to assess the potential merit of the claim that it really can't do in this set of circumstances without granting a stay of execution.

So your comments on that would be helpful to me. I want to start out by saying I don't think this is Gomez versus District Court. This is not the Robert Alton Harris case. But there is the problem that the court, Supreme Court addressed in that case where a challenge could have been brought for many years and wasn't and now on the eve of execution the Court is being asked to stop everything and look at it.

So your thoughts on that would be very helpful.

MR. ALEXANDER: Thank you very much and then I'll return to the corollary to the point I started out with which was simply that the corollary of that point is that in denying or granting a TRO a court should not effectively grant one side or the other final relief. And if that's the case, that's what would happen if the TRO is denied.

But let me get exactly to the point that you raise and I will go back to the Gomez case because while I appreciate Your Honor's view of it I think there are aspects of it that help explain why there is no delay in this case.

Let me, first of all, take exception

with all due respect to the statement of the Court that the protocol has not changed. The protocol, which we attached as an exhibit to our papers under which we are operating for this current execution, was adopted in June of 2003, and I have that with me here.

More importantly that very protocol provides that the plan will be reviewed and/or revised by the chief deputy warden annually in the month of October and forwarded to the warden for approval prior to submitting the manual to the Director of Corrections.

So in this instance our starting date at a minimum is October of 2003 because until that time one does not know what the procedures specifically will be and more importantly we still, Mr. Cooper still does not know because we have not been provided the complete regulations of 770 to know exactly how they intend to go about this process.

THE COURT: Well, have the drugs changed, have the dosages changed, have the sequence by which the drugs are administered, have the protocols for how the drugs are injected into the prisoner, have any of those things been

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changed materially over the years as these modifications have been made?

MR. ALEXANDER: We don't know because we do not have all of San Quentin operational procedure number 770. So we have -- we have -- and since this is a TRO we have obviously not had the opportunity although we've requested that information.

So we start with October of last year. Now, I have explained to the Court precisely the circumstances of the change of counsel in this case and it is true that Mr. Amidon apparently started to look at this issue in October of last year after the Supreme Court upheld the ruling by the San Diego Superior Court of Mr. Cooper's desire to have some additional testing, et cetera.

So I suspect that that's what prompted him to finally look at the issue.

Now, let me go to the Gomez case because, as we all know, Gomez is really quite a unique circumstance. It's the one that people will remember. The Supreme Court said to the Ninth Circuit no more stays after four of them at the very last minute. And the abuse of the

process there -- I'm sorry, the manipulation of the process arose precisely out of that.

Now, that case was in the context of a writ of habeas corpus where the United States Supreme Court on its own chose to convert a 1983 action into a writ of habeas corpus, an issue it has now decided and has taken cert on. And that's the issue that the Supreme Court has taken -- or I believe it's exclusively in the context of lethal injection, not the issue before this Court as to whether or not lethal injection constitutes cruel and unusual punishment.

And to be more specific we're not just talking about whether lethal injection constitutes cruel and usual punishment. We are talking about whether or not lethal injection constitutes cruel and unusual punishment as it is implemented in the State of California. That's really the precise factual context in which it occurs.

Now, there is no authority cited by the Defendant that in a 1983 action, which is what we have here, that one can deny a Constitutional right of an inmate who has that Constitutional right until the moment of his execution, and

frankly through the execution, I guess, until he's dead, to be free of cruel and unusual punishment.

So we are now talking about a 1983 action. We are not talking about a writ of habeas corpus.

THE COURT: Well, although the court in Gomez said it didn't matter whether it was a 1983 or a habeas.

MR. ALEXANDER: And what I'm suggesting to you now, Your Honor, is the court is reviewing whether or not that is correct and that's precisely what it's taken cert on.

THE COURT: I thought what they were looking at what was whether it was proper to bring a 1983 challenging the method of execution and whether that had to be a habeas subject to AEDPA rather than something that could be brought originally in the district court.

MR. ALEXANDER: Well, in the Ninth Circuit notwithstanding the Defendant's citing cases of other Circuits, the law is quite clear in Fierro.

THE COURT: Absolutely. We wouldn't be here otherwise.

MR. ALEXANDER: Right. That you can proceed under 1983.

THE COURT: Right.

MR. ALEXANDER: So Mr. Cooper is properly here under 1983 and whether or not these matters could have been raised in a writ proceeding, assuming he knew and it was ripe enough to bring them earlier because there were -- there were proceedings pending. There were challenges even up until October of last year to his innocence and there continue to be challenges. We are waiting for the California Supreme Court as we speak.

THE COURT: Well, we're monitoring that, too.

MR. ALEXANDER: We are as is everybody and I addressed that with Ms. Wilkens at the very beginning of the hearing if on my drive up here I may have missed something, but we have not heard anything whatsoever.

So our point, Your Honor, is that in a 1983 action waiting to this point does not constitute the abusive which was -- which was ten years in the -- in Alton Harris case or certainly there is no evidence of the manipulation of the

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process. That was a very unique case.
THE COURT: Well, but let me just ask you, and I don't want to get too far afield here, and I'd actually like to talk about the merits of your client's claim a little bit, but it seems to me that it could end up being a very mischievous thing and my understanding is this is why the Supreme Court perhaps took the Nelson case.
If anyone who filed a 1983 claim that was not patently frivolous could use it as a way of getting a stay of execution, in other words, it seems to me the timing is relevant at least to some degree and then the question is well how relevant is it and do you have to show intentional abuse or is there a diligence standard or what, but to say that timing is irrelevant would suggest that anyone on Death Row with a pending execution date would actually be well advised to wait until the eve of execution to file a 1983 action.
MR. ALEXANDER: My point was -- and I think those are considerations that the Supreme Court will obviously take into account when it decides the issue and I don't pretend to be familiar with all of those issues. So I think

you're exactly right. Those are the issues, but let me go to the contrast here.
In Gomez we have ten years. I don't know what the time period is under a writ proceeding and, indeed, the law in California is you cannot challenge the manner of execution under a habeas corpus. So you have to bring a 1983 action.
And this is probably an issue that the California -- that the US Supreme Court will get to, but it is the conditions and term of the sentence that are properly addressed in a writ of habeas corpus, not the manner of execution because 1983 clearly is the vehicle in which you challenge one's Constitutional rights -- now -- in which you seek to protect one's Constitutional rights.
Now, let me, if I might, Your Honor, in responding to this refer you to the same procedures and it relates specifically to a substantive issue. But on page 29 of these -- of this procedure --
THE COURT: You're talking about 770?
MR. ALEXANDER: No. It's not actually, Your Honor. I can provide you a copy for

convenience, if you'd like. It is actually what is referred to as the -- It says California State Prison San Quentin -- well, I take it back. I guess it is 770. I misspoke.
THE COURT: All right. So it is 770. I can find it in the exhibits?
MR. ALEXANDER: Is that right, Counsel? Yes. Okay. I'm sorry.
THE COURT: Page 29?
MR. ALEXANDER: If you look at page 29, two weeks prior to the scheduled execution -- I'm sorry. I'll wait, Your Honor. I apologize.
THE COURT: I'm still looking for it.
Thank you, Counsel. It will save us both time.
MR. ALEXANDER: Surely. May I approach?
THE COURT: Hand it to the clerk.
I'm with you now. Go ahead.
MR. ALEXANDER: Okay. On page 29, it's actually d, it says: "Procedures. Two weeks prior to scheduled execution. The lieutenant in charge of the chamber will notify the warden that the following procedures have been accomplished: Specific staff assignments to the execution

detail have been made," which include the selection of the execution team.
One of the substantive issues that we raised in our complaint is whether or not the individuals who will be administering and monitoring from outside the execution chamber, which, by the way, distinguishes California from many other states where they have somebody actually right there, whether those persons are qualified. We have not received that information and that's information we want to have because that's a basis.
So the Department of Corrections itself up until the very last minute is still getting ready for the specifics, the specific manner in which they are going to implement this procedure.
So I guess the short of my answer on that is, one, we got into this case in -- and not to be facetious about it, but I've never tried so hard to work around the clock for free in my life and didn't get in as early as we would have liked.
THE COURT: I have one other question on that and then I would like to just talk a little

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bit about the merits. You didn't need to be appointed to file a 1983 action. You didn't have to be approved by either a state or a federal court for that purpose as far as I know.

I understand that there were complications with regard to the habeas and the other proceedings because there was already appointed counsel, but this being a civil complaint and not a habeas is there any technical reason why you couldn't have represented Mr. Cooper earlier?

MR. ALEXANDER: I don't know the answer to that question candidly, Your Honor, but as a very practical matter, and we are in a very practical situation, there were and still are counsel who were involved at the time and getting the files and the records and examining this matter in its whole context were not made available to us. It's been a continuing difficult problem.

So the first thing when we got appointed was we were given a very short date for a clemency petition and I'll just be, you know, candid. We had to address that. We had to address it over the holidays when the people we

needed were not available.

Now, could we have gone and written up the 1983 action and contacted the experts during that period of time? Perhaps. I really don't know whether we could have. But again I'd say the so-called delay here is really very short candidly compared to anything that the Court has raised.

Now, before I go on to the substantive areas with the Court's permission I would -- and since I expect that Your Honor will take the matter under submission and will issue your order I would bring to your attention, and I do this most respectfully to a Harvard man to rely on a Yale Law Journal article.

THE COURT: That's fine with me.

MR. ALEXANDER: And it was written by the constitutional scholar Erwin Chemerinsky and Evan Caminker, which talks about the issues that you've addressed. I will provide a copy to Ms. Wilkens. I think it will be beneficial to Your Honor.

THE COURT: Very well.

MR. ALEXANDER: I do think just to go back, and I know it's not Gomez, but I think that

is a case where candidly the Supreme Court was simply sick and tired of what was going on in that case and I think it manifested itself --

THE COURT: Well, I think that was the context in which I made the comment I did that I don't see this case as being a cookie cutter version of Harris because that was a notorious case and it was notorious in many ways and, whether you're pro-prosecution or pro-defense or pro-death penalty or anti-death penalty, there was much about that case that was notorious.

So I don't know how useful a precedent it is, although the Supreme Court did make some fairly strong comments in that case that I can't ignore. But I really would like it at this point if you could talk a bit about the substance and if I could direct you a little bit.

MR. ALEXANDER: Sure, Your Honor.

THE COURT: Dr. Dershwitz rather forcefully sought to rebut your medical experts and set forth a fair bit of statistical analysis and drew upon national experience. What do you have to say about that?

I know you mentioned something about it in your reply, but I think in terms of what I

need in order to evaluate this case your comments about that would be helpful.

MR. ALEXANDER: Well, let me start out by saying, and I go back to the standard, that in this case where the balance of hardships so clearly overwhelmingly weighs on one side, and that is on Mr. Cooper's side, that even the existence of a possible invasion of a Constitutional right is sufficient for Your Honor under the law to make a finding that both of the elements of a temporary restraining order are met.

THE COURT: Well, it's a sliding scale approach. You've got --

MR. ALEXANDER: It is a sliding scale.

So my point is that the robustness let's say of the seriousnesses of the merits in this case probably more than I may meet in any other case, certainly the IP area that I normally work in, would apply. But let me go to your question specifically.

And that is the issues -- well, let me start off by saying two of the chemicals that are involved in this process are prohibited after full public hearings to be used for the

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euthanasia of non-livestock animals in the State of California. You cannot use potassium chloride and you cannot use what I always have trouble pronouncing --

THE COURT: Pancuronium.

MR. ALEXANDER: Pancuronium bromide or Pavulon.

THE COURT: But aren't those the same drugs that are used nationwide for lethal injection?

MR. ALEXANDER: No, they are not, Your Honor, because, for example in 19 states the Pavulon, the paralyzing element that simply masks the pain that the prisoner is going through, okay, is not employed. New Jersey itself specifically eliminated that usage. So there are 19 states that have eliminated it.

THE COURT: And 18 that haven't?

MR. ALEXANDER: And 18 or so that have not.

So the issue that needs to be resolved on the merits and not in the context of a TRO is what are the evolving trends of decency in the State of California, which is the test or part of the test as to whether or not something is cruel

and unusual.

And in this case these particular procedures were adopted by the wardens. He went and talked to other wardens we're told. We don't know. We haven't had any discovery on that and what was said. And he went to Texas. Maybe the standards of decency may differ there. He didn't go to the states, apparently any of the states where they've eliminated these -- certain of these chemicals from the process.

So he's got kind of a biased result, but more importantly there have been no determination other than by the warden that this is an appropriate procedure and does not offend standards of decency in California.

With regard to the Defendant's experts' specific reference, what is absolutely missing from the declarations, it assumes that the barbital that goes in first, the sodium barbiturate that goes in first, okay, is, in fact, injected properly. That is not an assumption that can be easily made and we demonstrated in our papers that there have been errors in that and what results.

THE COURT: But haven't those involved

generally inmates who had particular medical issues, they didn't have any good veins or there were other problems? In other words, it was the result of a some peculiarity in the individual person who was being executed rather than the protocol itself.

MR. ALEXANDER: Well, we need to do -- we would like to do some discovery on precisely that kind of an issue, but I don't think that was the case of the woman whose declaration that we submitted whose name I forget for the moment.

THE COURT: The Anderson execution, the last, the last one.

MR. ALEXANDER: Right. So what Mr. Dershwitz's testimony or declaration, and I would like the opportunity to examine him on it, which I have not, does not -- assumes that the -- the first stage will go properly, and that is an assumption I don't think one can easily make. And at this temporary restraining order stage I'm not in a position to provide you other than what's in the papers and I won't repeat what's in the papers to you.

But there are differences. For example, and this is not addressed by Professor Dershwitz,

you have no personnel other than the inmate in the execution chamber. That's very different than many other states. It's very different in the Tennessee Chancery case that came down that's on appeal.

And so if there is a crimping of the two nobody on the outside is going to notice that. Nobody will know whether or not because they are not next to the inmate, nobody will know whether or not the initial short-term sedative has taken effect. And remember this is the sedative that we all get that lasts just long enough for them to be able to put maybe another tube or the like in it.

So I think there are a lot of problems and, if everything went perfect and the like, then at least the short-term sedative would work, but I don't think that's an assumption based on the state of the record at this point or a factual finding that can fairly be made.

THE COURT: Okay. I know I've asked you a lot of questions. I'd like to give the State equal time. So if you could wrap up with anything else that we haven't covered.

MR. ALEXANDER: Sure. If I might

just -- because I don't want to take time on issues that have not come up.

Going to the substance, I don't think there is a serious dispute that we have established serious issues going to the merits under the law in the Ninth Circuit. The differences between our experts and those submitted by the Defendant, to me, pose some very serious questions that need to be explored and must be explored.

One of the most troubling is why do we need the second step. If, as Mr. Dershwitz says, the first stage makes the prisoner unconscious and perhaps enough to almost kill him or her, then there is no medical or humane reason for the Pavulon. The Pavulon is there for one simple reason: To mask the excruciating pain that the potassium chloride causes.

So that procedure which New Jersey and all those other states have eliminated is something that is present and I submit that Your Honor may have to decide and should decide whether or not that is justifiable. And, again, there has been no public hearing or examination on this issue.

And I mentioned already no one checks to see if the inmate is unconscious before that second chemical goes in. You don't know under California's procedure and I don't know what provisions the State makes. If something goes wrong what are we going to do? Are we going to run in there and what happens?

So my simple point on that is, yes, there are differences between the experts. I expect that. But if the test is are there serious questions that surround this procedure, the fact that it's not suitable for animals, well, then, maybe we have to have a determination as to whether or not if it's not suitable for animals, non-livestock animals, if it's suitable under standards of decency, evolving standards of decency for human beings. And nowhere does Mr. Dershwitz address the question of why do you need that second chemical.

I have much more to say as you might imagine, but I appreciate the fair opportunity I've been given and I'll respond if the Court will allow me.

THE COURT: Thank you. I think we should hear from the Defendants at this point

and, if there are issues you need to rebut, we will allow some time for that.

MR. ALEXANDER: Thank you, Your Honor.

THE COURT: Okay. Ms. Wilkens?

MS. WILKENS: Thank you, Your Honor.

Your Honor, initially I would like to clarify. Counsel has indicated that the United States Supreme Court has never applied Gomez since issuing that decision and I don't believe that's accurate.

THE COURT: He said that in his brief and I believe your brief cited at least three cases this year where they've adopted the same approach.

MS. WILKENS: Yes. And very significantly there have been nine executions in the last few weeks and the most recent last evening and in all of these cases they are making the identical claims that Mr. Cooper has brought before this court. They are copycat lawsuits and all of the equities, all of the balancing are precisely the same, and over the last few weeks these executions have gone forward despite the exact same claims.

And I think it's relevant in terms of

both the balancing test and the application of Gomez and I also think it's important in terms of the delay because the procedural postures were very similar.

And with respect to Fierro and the holding that a 1983 is proper, I think that that particular case has to be informed by the United States Supreme Court's decision in 1998 in the Calderon versus Thompson case where the court made it very clear that whatever procedural vehicle was being utilized when it impacted the state's ability to carry out a judgment or a sentence it must be informed by the Congressional reform that limits this type of last-minute successive litigation.

And I think it is critical to inform the application of the temporary restraining order by the very strong language in Calderon versus Thompson.

Now, with respect to the --

THE COURT: Can I just stop you there, Counsel.

MS. WILKENS: Sure.

THE COURT: Because hopefully I won't get one of these cases anytime soon, but it is a

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recurring problem, as you point out and as Mr. Alexander pointed out, there is a tension as long as a 1983 action is permitted in the Ninth Circuit, and it still is, and you have the finality concerns that Congress expressed in AEDPA. What is the standard when you have a last-minute 1983 action as you do here?

At one extreme it was the factual pattern that you had in Gomez where you had -- however one characterizes it you had a lot of successive petitions as Mr. Alexander conceded, four stays at the last minute and the Supreme Court finally said we've had enough, we're done. Say that's one extreme.

What if you had a hypothetical situation, and I'm not suggesting that we do here, but if you had a hypothetical situation where there was a new factual discovery a week before the execution which implicated Constitutional rights? Is it your position, is it the State's position that one could never bring such an action under current Ninth Circuit law or simply that the bar is very high and it has to be something exceptional like that?

MS. WILKENS: Well, with respect to the

Congressional reform, it would have to go to -- whatever was newly discovered would truly have to be newly discovered and it would have to go to the guilt of the individual. It could not go to the penalty phase or to the manner or method of execution.

THE COURT: Well, I'm trying to think of a hypothetical that won't be disrespectful of the interests here or trivialize the problems, but let's say that last week the State of California decided to use a different drug to anesthetize an inmate before execution and there was evidence that that drug had some horrible side effect that inflicted undue suffering and there had been no opportunity to litigate that particular issue.

Is it the State's view that that issue could not be presented or that that is the type of exceptional circumstance that might distinguish the case from Gomez and from Calderon and from AEDPA?

MS. WILKENS: I think that would be a very significant distinction. I don't know that the law would permit it, but it certainly distinguishes it from Gomez and it certainly -- with respect to the Calderon v. Thompson, you are

to be informed by the principles, not bound by the letter of the principles.

So under that particular scenario in theory the law could permit it.

THE COURT: So if it's an issue that the inmates had a fair opportunity to raise and it's raised at the last minute, that's one situation. If it's something that's truly new and new as AEDPA defines new, then that might be something different.

MS. WILKENS: Well, I think that's the focus of Nelson is a change in procedures.

THE COURT: Okay.

MS. WILKENS: And I think that also when Your Honor mentioned -- I think counsel has injected a little confusion because in Gomez there was an order that came out subsequent from the published decision and that was essentially the order that was there will be no more stays issued.

The decision we rely upon was actually issued earlier in the series of abusive stays. So it is not accurate to say that that decision was the culmination of five efforts at stay. It came earlier in the chain of events.

And with respect to the battle of the experts, I would only observe that Dr. Dershwitz and Dr. Heath were the experts in Ohio and that battle of experts did not cause the issuance of a stay at the district court level, by the Circuit Court or by the United States Supreme Court.

And I would also note that in Ohio the district court acknowledged that there were experts, that there were competing decisions, and they described Dr. Heath as a physician. They described Dr. Dershwitz as an extremely well-qualified physician.

And so if there is a battle of the experts, it's not a very good one because the State's expert is uniquely qualified and very very well qualified.

Additionally, it's a battle of the experts that is not one that is undertaken in the eleventh hour. It is not a basis for a stay of execution.

I would also say with respect to counsel's explanation of delay, it is not remotely acceptable. The individual who assisted in filing papers, Mr. Grele, is an attorney who is not even of record and was able to work on the

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paperwork.
THE COURT: On the 1983 case?
MS. WILKENS: Yes. And, as Your Honor pointed out, nothing precluded any attorney from representing Mr. Cooper at any time in bringing a 1983 action, did not require approval or appointment by state or federal courts.
Additionally, the protocol that counsel references as having been revised in June of 2003, that protocol was provided to Mr. Grele by the State in conjunction with discovery in other capital cases. Mr. Grele is well acquainted with the issues that are being presented to this Court and with the discovery of the San Quentin protocol.
Now, if you were to accept counsel's argument that an annual review is a sufficient process to permit coming in in the eleventh hour, we would see this in every case, and we've seen it across the country.
Now, the protocol we know is unchanged in any significant respect. The warden indicates in her declaration on page 2 in paragraph 7 that California carried out its first execution by lethal injection on February 23rd, 1996.

California continues to use the same three-chemical combination.
Now, another point that counsel has made, he represents to this Court that 19 states no longer use Pavulon. I do not know that to be true and I do not believe that is accurate, but what I do know is the nine executions that have gone forward in recent weeks including the one last night, they all use the same three-chemical combination as California.
The only distinction is that North Carolina uses Pavulon as its third chemical, not its second. The other distinction is the other states use considerably less anesthesia than California. So those are the only distinctions.
Now, with respect to the change in counsel, I disagree with the characterization of a change in counsel. There has been a continuity in representation for Mr. Cooper. The California Supreme Court indulged Mr. Cooper by allowing four additional attorneys to associate into his case, three from the Orrick law firm and Mr. Mazer, a veteran post-affirmance defense litigator. And you will see that Mr. Grele who is assisting is not even of record.

In addition, it is well known and documented in the Supreme Court filings that Mr. Cooper is being assisted by the Habeas Corpus Resource Center. He is also being assisted by the California Appellate Project. These are all very large defense organizations specializing in capital litigation.
So the picture of Mr. Alexander being overwhelmed by assuming responsibility for Mr. Cooper's litigation is not a very good picture.
Also, he mentions the burdens of the clemency petition, the short deadlines. These are all standard deadlines with respect to seeking clemency and also I must comment. He notes that he was -- he went to San Diego Superior Court to make a discovery motion because they wanted to find out for the first time what did the sheriff's investigators do at the crime scene.
That was a subject of extensive motions, pretrial motions. It was the subject of extensive litigation on direct appeal and even more extensive litigation over the course of 20 years. So the fact that they've utilized time in

the eleventh hour attempting to perfect discovery on issues that have been litigated over and over shows that there is really not a genuine intent or a confidence in any of their issues.
As early as Monday they were litigating a writ of mandamus in the San Bernardino Supreme Court attempting to obtain the personnel file of a criminalist who was fired three years after he worked on the Cooper case.
This is a matter that has been litigated in post-affirmance litigation over the years. But they have the time and the resources to pursue something so trivial in the eleventh hour. Yet they attempt to convince this Court that they are here as quickly as they could be, and that's simply not true.
I would also observe that it is not a coincidence that the habeas corpus petition that is pending in the California Supreme Court was filed on the same day as the lethal injection papers in this court. It is rather obvious that Mr. Cooper is not genuinely interested in litigating any of his claims. He is simply trying to overwhelm the courts and the state with last-minute litigation.

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If there are any questions?
THE COURT: I just had a couple. On the litigation in the other states --
MS. WILKENS: Yes.
THE COURT: -- are there any dissimilarities or significant differences between the protocols of the states that use Pavulon and California other than the ones you've already mentioned?
MS. WILKENS: No. I've mentioned the sole distinction.
THE COURT: Less sodium pentothal.
MS. WILKENS: Less.
THE COURT: And in North Carolina the sequence is different.
MS. WILKENS: Yes. North Carolina uses the Pavulon after the potassium chloride. They are the only state to do so.
THE COURT: And did any of the state courts get past the injunction stage in their review of this matter? In other words, were any of the cases litigated with full discovery?
MS. WILKENS: Yes. I believe Tennessee and Georgia in the state courts.
THE COURT: And found that there was no

Eighth Amendment problem with this type of protocol?
MS. WILKENS: That's correct.
And I would also note that Dr. Heath, his opinion in Ohio emphasized the low dosage of 2 grams and was quite critical of it and then he comes into California and seems to have equal difficulty with 5 grams, which is also indicative of his lack of credibility.
THE COURT: Is there any significance in this case in the fact that Mr. Cooper in particular does not appear to have any physical impairment in terms of receiving the injection in the normal course? In other words, he doesn't need a cut-down, he doesn't need --
MS. WILKENS: Yes, Your Honor. That certainly distinguishes him from Nelson and from Reid and I believe that Mr. Cooper has, in fact, conceded that no cut-down will be necessary. The warden has undertaken to confirm with medical personnel that it will not be necessary. He has no impairments. His veins are in very good condition. They've been identified, they've been verified, and an IV will be appropriate.
THE COURT: And I think my last question

is the last point that Mr. Alexander made, that two of the drugs are not legal for euthanasia of animals. What's your response to that?
MS. WILKENS: I believe he's incorrect in stating that the State of California precludes their use. I am aware that other states do preclude their use, but frankly it's apples and oranges. And the concern of the veterinary community was people not using anesthesia at all in conjunction or not using adequate quantities because they are animals. I mean, it's just really a non-issue.
THE COURT: Is it a cost-cutting issue that if you use potassium chloride on an animal that had not been properly euthanized it would be way too much for the purpose?
MS. WILKENS: Well, I think the concern is that if you use Pavulon without any anesthesia it would be inducing paralysis which would be disconcerting, but the concern is that there's no anesthesia being used or it's not adequate. And obviously with California I believe Dr. Dershwitz indicated 13 hours the person would be unconscious.
THE COURT: The purpose of the Pavulon

as Plaintiff characterizes it is to mask the symptoms. As I understand the State's position -- I just want to make sure I understand it -- it is simply to prevent involuntary movement of the body when the potassium chloride is injected?
MS. WILKENS: It does limit the convulsing effect, but, also, it does stop the lungs because while the dose of the anesthesia is fatal it would take an inordinately long period for the person to die. And so what they have done is create a three-chemical combination so that death will become hastened so there's not a drawnout process.
And so by stopping the lungs and then stopping the heart you're effectuating death. After the anesthesia the death will come within a matter of minutes and that's why those two chemicals are used. I think Dr. Dershwitz was making the point that we get these lay people making observations about what the person is experiencing and without the second chemical by interjecting the third chemical it would be a very dramatic process for people watching it. So that's a factor.

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THE COURT: All right. If this case had been filed two years ago, would it be appropriate for the Court to at least order discovery and have an evidentiary hearing? In other words, if we weren't looking at an execution scheduled for Monday night, if it was a case that had been filed in due course and not under the gun of a pending execution date and there were an opportunity for the parties to conduct discovery -- it's not a case that's frivolous on its face, is it?

It's one where if we weren't looking at the particular timing problem we'd at least go forward with some type of discovery and taking of evidence.

MS. WILKENS: You know, I would certainly argue against it, but I cannot tell you that would be an abuse of discretion. And frankly when Mr. Alexander was informing the Court of all the things he would like to know I was thinking, well, then, you should have been here quite some time ago because this is not the time to be making requests about every facet of how California carries out an execution.

And, again, the involvement of Habeas

Corpus Resource Center, the California Appellate Project, these are large defense organizations who are charged with ensuring the quality of the advocacy or California's condemned inmates. It is no coincidence that this matter has been allowed to languish until a week before this execution. There is no confidence in the merits of the arguments and the claims that are being presented here.

THE COURT: Is the State in a sense suggesting that the reason this is being brought is simply to buy time?

MS. WILKENS: Absolutely, anything to take that date out of place. And, Your Honor, Mr. Alexander indicates there's no problem for the State because the State can simply do this again, and that is just not appropriate.

The United States Supreme Court has recognized particularly in Calderon v. Thompson the burdens on the State in carrying out a sentence of this magnitude, the impact upon the victims and the impact upon the courts and the State all the personnel that are required to carry out these sentences.

THE COURT: Thank you.

MS. WILKENS: Thank you, Your Honor.

THE COURT: All right. Mr. Alexander, anything you'd like to rebut?

MR. ALEXANDER: Yes, I would, Your Honor, please. Thank you.

First of all, as the Court is well aware, we are in the context of a temporary restraining order and Ms. Wilkens has made many assertions, none which are evidence. And similarly the assertions I made are not evidence.

What Mr. Cooper is entitled to is a hearing as to the constitutionality of the manner of execution to which he will be subjected. Ms. Wilkens in her brief and just now cited no Supreme Court case nor any Ninth Circuit case that holds that in a 1983 action there is a bar to asserting Constitutional rights that a person has up until the very moment.

THE COURT: That gets back to the thing you and I were talking about before, though. You're really saying if it's in the context of an execution there is no duty to be timely or diligent. If you file it, as you said in your papers, ten minutes before the execution the

Court needs to stop and look at it the same way it would any other TRO.

MR. ALEXANDER: No. You know, there may be an extreme case. All right? I think in the circumstances here. We don't have circumstances anywhere near Gomez, of course.

Now, let me correct Ms. Wilkens again and yet again this is a factual matter that needs to have testimony. She is simply incorrect in asserting that the State of California does not prohibit the use of Pavulon with or without a sedative agent. It's a matter of statute. It was done in full compliance with the Administrative Procedures Act.

So with all due respect -- but once again that's a matter that Your Honor can consider after full presentation.

It is also true that potassium chloride is prohibited in the State of California after full hearing under the Administrative Procedures Act of the State of California to be used for the euthanasia of non-livestock animals. So I don't -- so that's that one.

Her point about, you know, this is surely -- purely for delay. Mr. Cooper does not

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care about a resolution of his innocence. I'm sure Your Honor can take notice of all of the papers that have been filed in the Supreme Court of the State of California. We attempted to file in San Diego County Superior Court where we were obligated, absolutely obligated by California statute to seek permission to conduct some DNA testing.

And the courthouse doors -- I don't mean to get too dramatic -- were locked. We weren't even allowed to file it.

THE COURT: I think that's why I said the thing I did at the beginning. I have no doubt that Mr. Cooper and those who are advocating on his behalf are very aggressively pursuing claims of innocence. I was trying to distinguish that from the issues of this case which I have to consider which have no relation to those.

MR. ALEXANDER: That was my final point. That is not a matter for Your Honor.

Now, with regard to the procedures in other states and the notions that they may use the same chemicals, some do. We've seen that some do not. We cited the statutes in our brief

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in. Those states in which, for example, Pavulon is prohibited as part of this process.

So Your Honor can go back to the briefs and you will see that citation or I'm happy to provide it to the Court, if you so desire.

And I also find it curious that Ms. Wilkens would stand up here and talk about all these people who could have brought this matter because, first of all, Mr. Grele is a sole practitioner all by himself with many other cases. He advises us as does HCRC, the Habeas Corpus Resource Center, that is funded by the California Supreme Court and has numerous, hundreds of cases. It's not as if this is their only matter.

So I think -- and it was Ms. Wilkens who came down to San Diego when we tried to substitute in and opposed our getting into the case. Maybe if she would have let us into the case earlier we would have had that much time, and I think it was about three weeks it took us finally. We could have had that time and filed it. So I think she may very well be estopped from even asserting because she was in part the cause of our delay in getting into the matter.

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And, finally, one of the matters that we will raise, if the Court allows us to have a hearing, is the failure of Mr. Cooper's prior counsel at least in October to bring this lawsuit. And at the hearing last summer, a critical hearing in the case, Mr. Cooper's lead counsel didn't even participate. And what happened in December, in January of this year? He went off on vacation and he was incommunicado.

So that kind of conduct is now being attributed to Mr. Cooper in denying him his Constitutional rights.

I would say to Your Honor that given the fact that a denial of this temporary restraining order with all the disagreements that Ms. Wilkens and I have about the merits will have the result of giving them the final relief in the case. Mr. Cooper will be set to death under a procedure that we still don't know what it will involve.

Is it the warden who will help administer the chemicals? Will there be anybody in the execution chamber if something were to go wrong? The issue is not just the chemicals that are going to be used. The issue is the entire

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procedure and that's why it's set forth in such detail as best we can determine in the 770.

So I ask Your Honor in this context -- and we're not asking for a lot of time for this order to show cause. They can kill Mr. Cooper in a week or two weeks or three weeks or whatever it is. That inconvenience to the court -- to the State pales in comparison to the irreversible result that will occur if this issue is not examined.

THE COURT: Thank you very much, Counsel.

MR. ALEXANDER: Thank you, Your Honor.

THE COURT: One clarifying question I wanted to ask Ms. Wilkens just on Mr. Alexander's last point.

It's my understanding, and I'm drawing on past experience as a state judge, that if the execution does not go forward as scheduled that the State would have to get a new death warrant from the Superior Court.

Is that correct?

MS. WILKENS: That's correct, Your Honor. We don't go forward two, three days later. The warrant is valid for 24 hours and if

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it does not go forward we go through the same process that we've gone through here. So it's an appreciable delay.

And, in addition, I don't know what Mr. Alexander is talking about in terms of days and weeks because when you look at his discovery requests and everything he intends to do and you look at the procedural history of the case I think we'd be looking at years of time.

THE COURT: Well, I think if this Court were inclined to grant any relief would have a great deal of control over that. But I just wanted to be sure I was correct on the state law that if the execution does not go forward at 12:01 Tuesday then it would be another 45 to 60 days at the earliest before another date could be --

MS. WILKENS: Yes, Your Honor. It would be a minimum of ten days notice and we generally give a little more because of the concerns of the notice being given and then it's a 30-day minimum. So it would be 40 days minimum and you add a few days on top of that.

And, also, Your Honor if you could permit me to comment on the estoppel.

THE COURT: Okay. I will very briefly and then I need to take time to try to give you a reasoned disposition so you can go to the next court and know what I was thinking.

MS. WILKENS: I did want to state on the record that Mr. Alexander said I went to court and objected and tried to keep him from representing Mr. Cooper. I was very clear then and I just want to clarify again our position we didn't care who represented Mr. Cooper, but he was trying to get a Superior Court judge to allow him to represent Mr. Cooper when there was a valid appointment by the Supreme Court.

He did not meet the standards for appointment by the Supreme Court. We pointed that out to the judge and we expressed concern that this request was going to be cited as delay, this change of attorney, so to speak. And so we expressed that concern, but we acknowledged that we had no role with respect to who represented Mr. Cooper and really didn't care who represented Mr. Cooper.

So I did nothing to interfere with Mr. Alexander representing Mr. Cooper.

MR. ALEXANDER: One last comment, Your Honor?

THE COURT: The last comment.

MR. ALEXANDER: We did not come in as appointed counsel. We came in as retained counsel. We did not need in our view the permission of the California Supreme Court. That permission was necessary in order to allow the appointed counsel to get out.

THE COURT: Okay.

MR. ALEXANDER: So it wasn't our getting in. And I'm happy to provide to the Court the very objection and pleading that Ms. Wilkens filed, but I don't know that that's really necessary.

THE COURT: I'm not sure it's really going to make any difference. The issue of delay is obviously one that has been joined and I'm going to make a decision about, but I think that minute details are much less important than the big picture and I will certainly address that in my decision.

It's about 4:00 o'clock. I suspect that I will have a decision first thing in the morning, but if there's one sooner we'll let you know.

Does that work in terms of what you need to do next if you had it by 9:00 o'clock tomorrow morning?

MR. ALEXANDER: Yes, Your Honor.

MS. WILKENS: Yes, Your Honor.

THE COURT: Then I'll do my very best to have that.

MR. ALEXANDER: Will that be -- excuse me. I didn't mean to interrupt.

THE COURT: Go ahead.

MR. ALEXANDER: Will that be done -- can we set up a communication method by fax or by e-mail?

THE COURT: Let me just check with my clerk. Are we on e-filing on this?

THE CLERK: Yes.

MR. ALEXANDER: So it would be e-filing. Very well.

THE COURT: All right. Counsel, thank you very much. Again the briefs were excellent. The argument was very helpful.

To those of you here, whatever your position on this issue is concerned, there's no matter in the world I take more seriously than this one and I'll try to reflect that in my

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deliberations.

Thank you very much. We're in recess.

MR. ALEXANDER: Thank you, Your Honor.

(Whereupon, the proceedings concluded.)

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CERTIFICATE OF REPORTER

I, Peter Torreano, Official Court Reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

That the foregoing transcript is a full, true and correct transcript of the proceeding had in Cooper v. Rimmer, Case Number C-04-0436-JF, dated February 5, 2004; that I reported the same in stenotype to the best of my ability, and thereafter had the same transcribed by computer-aided transcription as herein appears.

PETER TORREANO, CSR
License Number C-7623

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD BEARDSLEE,	)	C-04-5381-JF
	)	
Plaintiff,	)	
	)	San Jose, CA
vs.	)	January 6, 2005
	)	
JEANNE WOODFORD, et al.,	)	
	)	
Defendants.	)	
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: Law Offices of Steven S. Lubliner
By: STEVEN S. LUBLINER
Post Office Box 750639
Petaluma, CA 94975

For the Defendants: Office of the Attorney General
By: DANE R. GILLETTE, DAG
455 Golden Gate Avenue
Suite 11000
San Francisco, CA
94102-7004

Court Reporter: PETER TORREANO, CSR
License Number C-7623

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San Jose, California January 6, 2005

P R O C E E D I N G S

THE COURT: Good morning. Please be seated.

At this time the Court will take up the matter of Beardslee versus Brown.

And, Counsel, will you state your appearances, please.

MR. LUBLINER: Good morning, Your Honor.

Steven Lubliner for Donald Beardslee.

MR. GILLETTE: Good morning, Your Honor.

Dane Gillette, senior assistant attorney general, for the Defendants.

THE COURT: Thank you.

Counsel, I've read your papers and to a significant extent the issues that are presented by this case are similar to those raised in Mr. Cooper's case. There are some differences and I'd like to address those through some questions. I'd like to focus the hearing on these questions, if we might.

I start with a question for Plaintiff's counsel.

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It seems to me you've raised a claim that Mr. Cooper didn't raise, the First Amendment claim. You've also raised the claims somewhat sooner than Mr. Cooper did, although the Government is still arguing that there was undue delay.

But I'd like to focus on what I think is still the linchpin of the entire case from a preliminary injunction standpoint and that is the sufficiency of the evidence regarding whether the dose of the barbiturate is sufficient to render the inmate unconscious.

That was the key finding or the key failing I think in Mr. Cooper's case, that it was speculative as to whether the amount of barbiturate that was used would be insufficient to anesthetize anyone and the evidence that Dr. Dershwitz provided was that it was a statistically insignificant possibility.

It seems to me unless there's something new in the record on that point, the First Amendment claim and the slightly different way that you've framed the Eighth Amendment claim, we don't get there. In other words, the preliminary question is whether there is a realistic

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possibility that Mr. Beardslee wouldn't be unconscious prior to the time that the pancuronium bromide was injected.

And so if you could focus on how your evidence is any different from Mr. Cooper's on that precise point.

MR. LUBLINER: On that precise point -- well, first of all, preliminarily I would disagree with the Court that that is the linchpin of the First Amendment claim. The Defendants concede that accidents happen. The Defendants concede that if an accident happens in this case Mr. Beardslee will suffer tortuous pain, which because of the pancuronium bromide he will not be able to communicate.

THE COURT: Actually, Counsel, I agree with you and that's one of the questions I wanted to ask Mr. Gillette. There is a difference between the Eighth Amendment claim and the First Amendment claim --

MR. LUBLINER: Yes.

THE COURT: -- as to the degree of risk. I totally agree with you. It seems to me your burden for the Eighth Amendment claim is to show that there's wanton or unnecessary

infliction of pain whereas for the First Amendment claim a realistic possibility of an accident might be sufficient to implicate the First Amendment.

I'd like to ask the State about that, but there has to be some -- it can't be a theoretical possibility. It has to be a real possibility it seems to me particularly if you're seeking injunctive relief without a full factual record. It can't simply be -- theoretically it's possible that an inmate would be conscious and would need to cry out and, if he couldn't because of the paralytic agent, then his First Amendment rights would be violated.

In order to get to that point you still have to show that there is some realistic possibility that he wouldn't be unconscious.

MR. LUBLINER: Well, I also have to respectfully disagree with that premise and that's a premise that the Attorney General cites absolutely no authority for. And I think if this were a classic prior restraint case where, say, the University of California prevented professors from publishing on this or that controversial topic, they couldn't -- they couldn't defend

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themselves against a lawsuit by the professor by saying, you know, we all interviewed the man and we don't think he has anything interesting to say anyway.

THE COURT: Well, no. I think there's a difference. Let's say hypothetically there was no possibility. We weren't talking even the thousandths or ten-thousandths of a percent that Dr. Dershwitz is talking about, but let's say we have a stipulated fact in this case that there was no possibility that the anesthetic would be or the barbiturate would be insufficient.

Where's your First Amendment claim then? I mean, there has to be a predicate to get to -- there has to be the possibility of an accident and it can't merely be a speculative possibility. There has to be some degree of possibility, doesn't there?

MR. LUBLINER: It's a unique situation because there's -- I can't see any other First Amendment context where we might say, look, the person might not have anything to say anyway, so who cares. I think the possibility of accident is acknowledged by the Attorney General.

The existence of what they call

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"accident" we say is confirmed in the execution logs for Mr. Babbit. It's confirmed in the testimony -- in the declaration about Mr. Anderson. It's confirmed in the why did they give the extra dose of Pavulon to Mr. Bonin, why did Mr. Siripongs take so long for his heart to stop and so on. So I think there's more than a realistic possibility of accident.

Now, as to your first question, as Dr. Heath says, this case is not about 2 grams versus 5 grams of sodium thiopental. This case is about administration. This case is not a facial challenge like we had -- like I submit -- you know, when I call a facial challenge like we have in all these other cases where they say -- where they talk about risk outside of the context of what is actually happened in the particular -- in executions conducted by the particular state at issue.

That's not our case. We're an as-applied case for want of a better word or as-misapplied in our position in looking at the execution logs. Dr. Dershwitz is silent on the execution logs. The Attorney General is silent on the execution logs.

BR
698

So I think for the First Amendment claim, to the extent you need to be concerned about the possibility of accident, a possibility they concede and a possibility that Judge Walker and the Ninth Circuit both found meaningful in the First Amendment context for the public to assess just what goes on in these executions, one accident, 100 accidents, one accident is enough.

THE COURT: All right. So if I can encapsulate your First Amendment claim, it simply is: As long as there's any possibility of an accident, regardless of the quantum of possibility, the use of a paralytic agent which would prevent the inmate from crying out in pain violates the First Amendment.

MR. LUBLINER: Yes, Your Honor.

THE COURT: So the burden that you have to meet is extremely small. You simply have to show that it isn't hypothetical, that there is at least some basis for believing that there could be an accident.

MR. LUBLINER: It's such a unique context I would hesitate to even say we have that burden under the First Amendment, but, to the extent we have it, they've conceded it.

ER 699

THE COURT: All right. What do we make of the decisions, and there clearly aren't any in California, that are plenary decisions? There's Cooper and there are some other cases that were not based on a full factual record, but what do we make of the decisions that have upheld this protocol, this type -- not 770, but just the use of the three drugs?

Is it the case that no one ever raised a First Amendment challenge in those cases? Is this the first time it's been raised?

MR. LUBLINER: As far as I'm aware, this is the first time that the inmate's First Amendment rights have been made. Mr. Cooper pleaded what he characterized as an access to the courts claim. He also pleaded a public right to know claim which the Attorney General argued he lacked standing to assert, and I don't think this court has ruled on that since it sent Cooper back to exhaust.

According to the article in the Daily Journal the other day, a man quoted in the New Jersey litigation who brought public access among other things lawsuit on behalf of a citizens group, this is the only -- this is the only claim

BR 700

of this kind.

THE COURT: Okay. So one way you would distinguish all of this other authority is simply to say that no one has ever presented this particular issue before.

MR. LUBLINER: That's fair, yeah.

THE COURT: And that you don't need to do much to raise the possibility that there might be a violation of this right to cry out.

MR. LUBLINER: Well, I don't think you need to do much and one authority that I find -- and I haven't cited, but one authority I find particularly persuasive and it was noted in Justice Stevens' dissent in the Gomez case, the Robert Alton Harris perpetual injunction case, where he noted in his dissent how -- why they should reach the merits of the lethal gas challenge because the Arizona Attorney General had recommended that Arizona abandon lethal gas after viewing of a particularly harrowing lethal gas execution in Arizona.

Now, I don't know whether that -- what happened in that particular execution would be characterized as an accident or inherent in what makes lethal gas cruel and unusual. It doesn't

ER 701

matter. The point is the kind of attempt at humane progress that happened in Arizona cannot happen in lethal injection states that use pancuronium bromide to paralyze the inmate.

THE COURT: Okay. Now, let me just ask you one other question, Counsel, on this general subject. The Eighth Amendment piece of your challenge essentially rests on the same evidence as Mr. Cooper had, doesn't it, because there haven't been any executions since then?

MR. LUBLINER: From the California perspective it rests on the same evidence. I believe Mr. Cooper submitted the same execution logs that we submit. He had kind of a different slant because he was more focused and somewhat vaguely focused on the inhumanity of pancuronium bromide as a paralyzing agent without coming right out and saying why under Ninth Circuit authority it in and of itself is cruel and unusual punishment.

And so at least in the moving papers that I saw he really only focused on the Bonin declaration and the extra dose of pancuronium bromide.

THE COURT: You framed the Eighth

Amendment argument a little differently and I think that's clear, but the underlying factual material is the same.

MR. LUBLINER: Well, Mr. Cooper did not have the wealth of evidence, toxicology reports from other states that we have since -- since gathered.

THE COURT: Okay. All right. I think that was all I had for you at least in this round unless there was something else you wanted to address, but that was the principal question I had.

MR. LUBLINER: Okay. Thank you.

THE COURT: Thank you.

Mr. Gillette, if you would -- if you want to respond to Mr. Lubliner first and then I have a couple questions for you.

MR. GILLETTE: Thank you, Your Honor.

With respect to the First Amendment showing, let me briefly comment on that and go to your specific -- I mean, excuse me, on the Eighth Amendment and then go to that First Amendment point you were discussing with counsel.

This really is indistinguishable in any significant or principled manner from the Cooper

ER 703

showing. If there is any difference in the materials that you have now that you didn't have at the time of Cooper, it's in Dr. Heath's declaration in which in this case he now concedes that the 5 grams of sodium pentathol, which is the first drug given to the inmate at the beginning of the execution, is in and of itself a lethal dose.

So he's acknowledged, as he did not in the Cooper litigation, that we're starting with a lethal dose of the first drug.

So the question becomes -- and there are other things we can discuss with that Eighth Amendment issue, but let me go to the First Amendment claim. In the sense that anyone has previously argued that you should not be able to use the pancuronium bromide because it will prevent the inmate from asserting an alleged First Amendment right to complain that he's in pain, that is apparently unique, but it's really nothing more than a variation on the First Amendment-type claims that have been raised throughout the country in other challenges to these precise lethal injection protocols.

BR 704

Cooper, of course, argued access to the

courts and a First Amendment right to observe arguing that it would prevent the observers from being able to tell if he was in pain. That even more precisely has been alleged in other courts and it's been consistently rejected. All the various claims that -- even since Cooper there have been at least four, I believe, efforts in various states to raise these kinds of arguments. They've all been rejected and stays have been denied in every one of those cases by the United States Supreme Court.

This is not, as counsel suggests, anything like a classic prior restraint case. The State has established a particular protocol for imposing the lethal injection to execute the legitimate judgment of the State that Mr. Beardslee ought to be executed for the crimes that he committed.

The use of the pancuronium bromide is a part of that execution process. It is also in the amount given a lethal drug, as, of course, would also be the final drug that is given, the potassium chloride. ER 705

The fact that it may have a restraining effect in some sense on his ability to make any

comment, I don't think that raises a First Amendment claim. I don't think there's prior restraint there. It's simply a part of the legitimate execution process.

It is also based, as I think Your Honor's questions suggested this morning, on the assumption that the first drug, the sodium pentathol, will not render him unconscious and keep him unconscious during the entirety of the execution process. Nothing in the new material that's been submitted in any way undermines this Court's finding which was affirmed by the Ninth Circuit in Cooper that there be an absolutely minimal, if any, risk of the inmate being conscious at any time after that initial dosage of the sodium pentathol is provided.

We have not conceded that there is going to be an accident, that anything will go wrong. There has been no showing in any of the California executions that there was a problem of some sort.

ER 706

I don't know exactly what it is counsel seeks to extract from these execution logs. They show that the drugs were provided in the order they are supposed to be provided very close in

time one after the other and they showed that there were variations in the time it took from the giving of the third drug to the final declaration of death when the cardiac monitor showed the flat line.

There is nothing to suggest in any of those that there was a failure to deliver the drugs properly, that the entirety of the drugs were not delivered, that there was any failure of the drugs to operate in the way they were supposed to. At most you have the logs from which you can extract no useful information and in a couple of the cases some anecdotal observations of the people who were there, none of which suggest that there was any indication that the inmate was suffering pain.

And it's exactly like the showings that have been made and rejected in every other state where a challenge had been made based upon the protocols that are used in California. Of the 38 capital states 37 use or authorize lethal injection either in whole or in part as a method of execution and 27 of the 37 states use the same combination of lethal drugs as California.

ER 707

And in no case before or after Cooper

has any court found that that combination of drugs raises any even reasonable risk of a possibility that the defendant will suffer any cruel or inhumane punishment as a result of the use of that drug protocol.

THE COURT: And just to follow up on something you said, the First Amendment claim about the right to cry out, you're analyzing it as a species of the First Amendment right to have the true circumstances of the execution seen by the world, which is a claim Mr. Cooper did raise.

MR. GILLETTE: That's correct.

THE COURT: In other words, the use of a paralytic agent prevents those witnessing the execution from seeing whether the inmate is in pain. That was one of the arguments Mr. Cooper raised. So it's a different form of speech. It's the inmate speaking out using his vocal cords rather than physical movements.

MR. GILLETTE: That is correct.

And it also assumes I think that even if the sodium pentathol were fully delivered and the inmate were in some way not completely unconscious, and there's absolutely no reason to believe that's true based on this showing or that

ER 708

of any other court, that anything he had to say would, in fact, be a report that would be in any way useful to the press or anybody else in ascertaining exactly what was happening to him.

THE COURT: No. I suppose if he was suffering extreme pain, in other words, the scenario which both Mr. Cooper and Mr. Beardslee have set out is there's a chance that the sodium pentathol won't be sufficient to render me unconscious, I'll be awake when I get the paralytic agent and I'll be awake when I get the potassium chloride and I will be in excruciating pain and I won't be able to tell anybody either by movements or by speech.

If that were true, that might raise some Eighth Amendment issues. It seems to me the question is whether there's enough of a possibility that that might be true to get us there.

MR. GILLETTE: I think that's exactly the issue and I think that he cannot get past the inadequacy of the Eighth Amendment showing, which is, as you've said, virtually identical to Cooper. That First Amendment right simply will never arrive. It won't become a ripe claim of

ER 709

any sort.

If he's not going to be conscious, he will be unable to experience any pain. The Reid case out of Virginia that's cited in our materials in which Virginia only uses 2 as opposed to the 5 grams of sodium pentathol in California found that the likelihood of irreparable injury from the manner in which that execution would be carried out was so remote as to be non-existent.

I think it's non-existent here and, to the extent his Eighth Amendment claim is non-existent, there is no First Amendment claim.

THE COURT: The First Amendment speech would concern the very circumstances that would violate his Eighth Amendment rights.

MR. GILLETTE: Correct.

THE COURT: Okay. Let me ask you a different question, Mr. Gillette. The State is continuing to raise the issue of undue delay.

Certainly in the Cooper case this Court found undue delay because it was so late. Here the case was filed more than a month before the execution date. The way things are now postured, if the Court were to go to the merits, it would

have to issue an injunction.

The plaintiffs in these various cases have contended that they are being given a Hobson's choice, that if they attempt to raise the -- raise constitutional questions about the protocol before the execution date is set and before the method of execution is chosen, the state asserts that the claims aren't ripe, whereas if they do it within that period of time, the state asserts that the claims are brought too late.

Just as a matter of judicial administration since I suspect whatever happens in this case this issue is not going to go away, how do we ever get to the ultimate question of whether the lethal injection protocol has any infirmities? Even assuming that in this case I'm not convinced that Mr. Beardslee has shown a sufficient likelihood of violation of his Constitutional rights to get a restraining order or an injunction, how does that issue ever get fully vetted if not in a proceeding of this kind?

MR. GILLETTE: Well, we have never argued, Your Honor, that the bringing of a lethal injection claim certainly in light of the

BR
711

statutory scheme that now exists in California would be untimely or not ripe if it were presented in a habeas corpus petition as part of the other challenges to the judgment that the defendant or the petitioner is facing.

In California, as you know, there is both lethal injection and lethal gas as alternatives. An inmate who is served with an execution warrant has a choice as between injection or lethal gas. If no choice is made, lethal injection is the default.

So a defendant who says or a petitioner who says in his habeas corpus language that he's challenging lethal injection is challenging the default claim, the one that he will face unless he affirmatively selects lethal gas, which, of course, we know from the LaGrand case would preclude him from raising that challenge.

It's really not unlike what ultimately happened in the Fierro case because Fierro was, of course, not the real goal of that litigation. It was Robert Alton Harris. But it was Harris and Fierro and one other death row inmate all of whom were named as plaintiffs.

Now, even after the temporary

BR

12

restraining order was stayed and Mr. Harris was executed that case went forward to an evidentiary hearing on the issue of whether lethal gas was a constitutional method of execution which was at the time the only method of execution and as that case initially progressed through the evidentiary hearing in the district court lethal injection was enacted by the legislature as an alternative but it was not the default. Lethal gas was the default.

So a defendant, a petitioner who raises this claim in his federal habeas corpus petition arguing that lethal injection, the state default, is unconstitutional would not be facing a claim that was untimely or lacking in ripeness.

THE COURT: All right. So just so I'm clear on this, if a person is sentenced to death in California and wishes to contest the adequacy, constitutional adequacy of the lethal injection protocol, what that person can do is raise that as a claim in his or her federal habeas petition --

MR. GILLETTE: That's correct.

THE COURT: -- and thereby obtain deliberate review.

ER 713

MR. GILLETTE: Absolutely.

THE COURT: Not in these eleventh-hour situations.

What about a 1983 claim directed at the process or the statute itself?

MR. GILLETTE: Well, we continue to question the appropriateness of 1983 versus habeas and I don't think that's fully resolved unfortunately by the Campbell case.

THE COURT: That's a pretty fact-specific case.

MR. GILLETTE: That was a very fact-specific case. But I certainly do not think that having raised or attempting to raise a claim in the habeas petition, which Mr. Beardslee did because he challenged lethal gas adding in addition as a part of the same claim an attack on lethal injection but conceding he didn't have any real grounds for attacking it, he did that in the state court, he did it in the district court.

It was the lethal gas claim that was ultimately rejected by the district court judge. There was no request for an evidentiary hearing on either the gas or the lethal injection and, of course, the lethal gas case really was following

ER 794

Fierro which had already been decided by Judge Patel.

THE COURT: At the time that Judge Armstrong had the method of injection or method of execution claim in her habeas proceeding was lethal injection the default already?

MR. GILLETTE: It had been, Your Honor, yes, because -- in fact, that occurred in the course of the Fierro litigation after the Ninth Circuit affirmed Judge Patel's temporary restraining order and while our petition for writ of certiorari was pending and all this was before, long before Judge Armstrong reached these issues, the legislature changed the default from gas to lethal injection and it was as a result of that default that the first Ninth Circuit opinion in Fierro was remanded by the US Supreme Court.

THE COURT: So as far as I can tell, Judge Armstrong did not rule on lethal injection. She wasn't asked to and she didn't.

MR. GILLETTE: She did not specifically rule on that, no.

ER 715

THE COURT: But are you saying that Mr. Beardslee could have raised it, in other words, it would have been ripe for him to raise

at the time of the proceeding before Judge Armstrong?

MR. GILLETTE: It certainly would have been.

THE COURT: Because it was a default method of execution at that time?

MR. GILLETTE: It was a default. And I don't think that just raising it and then effectively abandoning it, making no effort to prove it, that allows him to come back and use 1983. Certainly the Ninth Circuit has said and until we get more clarification from the US Supreme Court that 1983 is an appropriate means of challenging the method of execution -- the Ninth Circuit has, of course, also recognized the use of habeas corpus.

The Campbell hanging litigation in Washington arose out of a habeas corpus case. I don't think the court -- the court's decision, the Ninth Circuit's decision stands for the proposition that you can use one and, if it fails or you abandon it, then move to the other, certainly not at the last minute.

THE COURT: The Supreme Court's decision in Nelson seems to have focused on the fact that

there wasn't any other way, in other words, the cut-down procedure wasn't something that could have been raised by a habeas.

MR. GILLETTE: That is true, Your Honor, and that was a unique aspect of that litigation which is not present here. There is no allegation or any indication that a cut-down procedure will be at all necessary with respect to Mr. Beardslee and is not even alleged in the complaint.

THE COURT: So basically, if I understand the State's position, you're still making an undue delay argument with regard to Mr. Beardslee because he did have the opportunity in his habeas petition, in his habeas proceedings to raise the very questions he raised in that.

MR. GILLETTE: That's correct. And the fact is that while it may not be eight days before as it was in Cooper, it still wasn't presented until after the execution date was set. And the argument that Fierro compelled to him to wait that late is simply not true for the reasons that I've just suggested.

ER 717

THE COURT: All right. Thank you very much.

MR. GILLETTE: Thank you, Your Honor.

THE COURT: Mr. Lubliner, would you like to reply?

MR. LUBLINER: Yes, Your Honor.

Going back to the First Amendment claim first, the position that the Attorney General argues for would eviscerate the Ninth Circuit and this court's holdings in the First Amendment Coalition case.

Judge Walker stated: "Although lethal injection is generally regarded as the most humane and painless execution method, presently available technology and society's perceptions may evolve in the future. If there are serious difficulties in administering lethal injections, society may cease to view it as an acceptable means of execution and support a return to lethal gas, et cetera, et cetera, or a majority of the public may decide that no method of execution is acceptable."

The Ninth Circuit is to the same effect.

The same thing in the New Jersey case, the public access case.

ER 718

"Contemporary and evolving community standards of decency and morality are not reliably developed in a vacuum and under sanitized conditions."

THE COURT: Can I just stop you there. Those cases do indeed say that, but from an analytical standpoint how is your First Amendment claim really any different than Mr. Cooper's access to the court claim?

In other words, he's arguing there if you use the paralytic, people aren't going to see the true circumstances of the execution and that leads to exactly the evils that you've just alluded to in these two citations. That was an argument that Kevin Cooper raised.

MR. LUBLINER: Uh-huh.

THE COURT: So from an analytical standpoint the First Amendment argument, it's framed differently, it's couched differently, but isn't it the same argument? That by using the paralytic and preventing Mr. Beardslee from speaking as opposed to using the paralytic for preventing his body from showing evidence of pain, you are preventing free access, free public access to the true circumstances of the

ER 719

execution.

It's sounds to me like it's the same argument and the Ninth Circuit has already said in Cooper that based on the factual record as to the likelihood of a conscious inmate that it was not inappropriate for the court to deny relief.

So what I'm trying to understand and really the whole purpose of my colloquy with you this morning is to understand how your case is different from Cooper. I mean, because the State, of course, is arguing Cooper controls this case and you're arguing it doesn't because there are distinctions.

Cooper wasn't a decision on the merits. It was a decision on whether to issue a temporary restraining order or not, as this one was, but the Court in exercising its discretion I think wants to exercise it consistently. So what is different about your First Amendment claim from that standpoint?

MR. LUBLINER: Well, first of all, I did not -- I read the transcript of the argument in Cooper. The First Amendment claim was not argued. I read the order and the Ninth Circuit opinion and I do not interpret those opinions as

ER 720

orders as reaching the First Amendment claim.

THE COURT: Not as such. I agree with you. It doesn't say -- I don't think the words "First Amendment" even appear in the Cooper opinion and they certainly don't appear in the order that I issued. But the interest that you just identified from quoting from Judge Walker, quoting from the out-of-Circuit authority, the interest is the right of the public, the right of the world to see what's really happening in lethal injection and that interest seems to me identical.

MR. LUBLINER: Well, we have -- that interest is identical and I would submit that this Court did not reach the merits in Cooper as evidenced by the fact that the Attorney General later filed a motion to dismiss the first amended complaint on the grounds that Kevin Cooper lacked standing.

I would submit that would be the only basis that Kevin Cooper's First Amendment claim could have been denied that would have been consistent with the First Amendment Coalition litigation, a very technical view. When you're the speaker, you're not the hearer, you don't

ER 724

have the right to bring the claim. It would be totally inconsistent with the logic of the First Amendment Coalition case to deny Kevin Cooper's claim on anything other than a standing point.

The type of execution procedure that the State seems to envision in light of the First Amendment Coalition cases is a farce. Ideally they would have the curtain drawn until the inmate was strapped down and the IVs inserted, which was prohibited in the First Amendment case because that's what they want.

Ideally probably he already had had Valium. So he's kind of whacked out and there's nothing to see and then hopefully, you know, the drugs work well. If not, there's still nothing to see.

And I've kind of conceptualized this as like a CSI episode. I don't know if you watch --

THE COURT: Not very often, but I'm familiar with it.

MR. LUBLINER: If they conducted an execution under their protocol and it was a CSI episode, you'd see an inmate very serene as the drugs flowed in and the people watching seeing nothing happen and then the camera would trail

ER 722

down the tube leading into the needle into the inmate's arm and you'd see all that CSI heavy dramatization of the person's lungs on fire from the pancuronium and the potassium chloride burning up their veins and blowing up their heart.

And then you'd cut back to the audience and you'd see them watching a serene -- watching a serene, allegedly serene execution. The public's right to know has been vindicated, everyone would go home, and that's nonsense.

Now, I would say Mr. Beardslee does have the extra added interest not just in communicating to the public but also in improving his own condition as he lies there on the table to the extent it's possible. It's not clear from the timing of the protocols whether Mr. Beardslee would have a chance to say, "Hey, I'm still awake, guys. Help me out here."

You know, no one is in the room with him. He's not told when the saline is going to stop and when the thiopental was supposed to start and how much time is supposed to elapse between when the drugs are pushed.

BR 723

But it is inconceivable that under the

Ninth Circuit litigation which was decided not under broad First Amendment principles where you need a really compelling state interest to overcome the First Amendment rights, but under the Turner factors sent back, Turner factors applied, First Amendment interest identified, no compelling governmental interest asserted there.

And, you know, there's not even a whiff of one asserted here. There's no authority asserted here. Whatever cases Mr. Gillette is thinking about that have rejected it from the public's right to know standpoint, he doesn't bother to cite them in his brief just like he doesn't bother to bring in any expert evidence to say, well, Stephen Anderson died easy, Manny Babbit died easy.

You know, there's no evidence. There's a lot of argument. If there are these cases out there, they are wrong.

THE COURT: Okay. Thank you.

Anything else?

MR. LUBLINER: Yeah. Well, just on the basic Eighth Amendment point. This case is not about -- this case is not a facial challenge to the recipe as such. Dr. Heath agrees 5 grams

ER 724

properly administered is sufficient to do the job. No question about that.

The Reid case which they keep on citing on the issue of possibility of accident is not on point because Reid only considered the recipe. It specifically refused to address training, psychological profiles, who's doing it.

THE COURT: But there's nothing there. I mean, you've pointed out as to Mr. Cooper's counsel criticisms of those things within the Department of Corrections, but I didn't see anything in the record in this case or in that case that there actually were mistakes made as a result of that.

In other words, it's simply pointing it out and saying these people aren't highly trained as ideally they should be, but there's no evidence that that lack of training or that lack, asserted lack of professionalism has actually caused any consequences.

MR. LUBLINER: Well, I disagree with that vehemently.

THE COURT: Okay.

MR. LUBLINER: First of all, we don't know what kind of training these people get. We

don't know who they are, how these people are selected. You know, a lot of people go around saying in some high profile case, "Oh, sure. I'd throw the switch." But, you know, I'd like to think that most of us wouldn't. I'd like to think that most of us wouldn't take a free pass at killing somebody.

And so that raises questions about the psychological profiles of these people, are they substance abusers. These are issues that Connecticut considered in Webb. Connecticut also talked about the training and so on.

There's no evidence in the protocol, procedure 770, all of which we don't have, about who these people are, what their training is. All Dr. Dershwitz says is, well, he's heard, which is not in the protocol, that RNs and LVNs insert the -- insert the needles.

THE COURT: No. I guess my point, Counsel, is that you can imagine all sorts of horrible scenarios, but what evidence is there that any of them has actually come to pass? In other words, from the execution logs that we have, from the actual implementation of 770 is there any nexus between human error by employees

ER 726

of the Department of Corrections and what the observers observed?

MR. LUBLINER: Is there -- well, we don't know what error, what negligence occurred obviously. You know, getting information out of -- out of -- on these cases is very difficult. We still don't have Stephen Anderson's log. If you read the exhibit about what happened to him, it should inspire concern.

It's not expert declaration. It's a percipient witness. But we have Dr. Heath saying, well, why did these people give William Bonin a second dose of pancuronium bromide, what that does mean about the process, were they fumbling around, they didn't sedate him and they grabbed the syringe.

We have Dr. Heath saying that Manuel Babbit's execution log suggests that his heart rate was too high. If the drug had functioned properly, his numbers on his log shouldn't look like that.

BR 727

We don't have Dr. Dershwitz saying anything like that. We have Mr. Gillette saying, well, fiddledeedee, just they are numbers and that's just argument. This is all about -- this

is all about administration and to some extent it's kind of a res ipsa loquitur case from our point of view. I don't know if we need to call it negligence or strict liability. We have this evidence. This is not a facial challenge like all these other cases are.

And to say that, you know, nurses are inserting the IVs, anyone who's ever had blood drawn for a lab test knows that you sit around and they do their best, but, "Oh, no. Gee, I thought I had it." And if you watch someone in the hospital hooked up to an IV there are all sorts of horror stories.

THE COURT: Basically, though, you're saying ultimately that the Court should simply take, on this point at least, the same evidence that it had in the Cooper case and reach a different conclusion even though the Ninth Circuit found that conclusion to be correct at this procedural stage.

MR. LUBLINER: Given the slant that we have put on it I would say, yes, yes, that's true. And I would also say that one thing that stands out from this Court's ruling in Cooper is the ruling that the State has articulated a

ER 328

legitimate interest in using pancuronium bromide to stop an inmate's breathing.

And that is a point -- and I think that's how this Court dealt with the heart of the Cooper litigation which was pancuronium bromide. And we have said in our papers citing, Campbell, the hanging case, and citing Fierro, the lethal gas case, that asphyxiation that causes death is not a legitimate interest under the Eighth Amendment. And that kicks out that aspect of the Cooper ruling right there and they don't rebut that.

You know, asphyxiation isn't like cholesterol. There's not good asphyxiation and bad asphyxiation. There's just suffering.

THE COURT: Okay. Anything else, Mr. Lubliner? I think I have a full idea of what your arguments are. Is there anything else you wanted to add?

MR. LUBLINER: Just a second, Your Honor.

Just on the question of tone, Your Honor. The Government's position to my mind boils down to "we're the government, trust us," which is kind of like "the check is in the

ER 729

mail."

If they wanted us to trust them, they would come forward with an expert who would say, "Well, no. Look, nothing happened bad to Stephen Anderson. Here is why your concern is misplaced. Manny Babbit died easy. Here's why. Let's explain that to you. Let's put Mr. Beardslee's mind at ease."

When we ask for discovery for documents to fill in all these holes in the protocol if they would have said, "Oh, my goodness. Sure. We'll give that to you right away. So let's put Mr. Beardslee's mind at ease." That didn't happen.

An acceptable fall-back position would have been, well, we can't give them to you right now because obviously there are confidentiality concerns and let's wait until we can get an appropriate protective order limiting disclosure to attorneys eyes only and so on. That didn't happen.

We got: "You didn't get it. You're not entitled to it. Mr. Beardslee is not entitled to answers to his questions. We don't care." ER 730

As far as the First Amendment claim, if

they were so confident in their procedure, what we say and we prove that pancuronium bromide violates his First Amendment rights, potentially violates his Eighth Amendment rights, they would say, "Execution without pancuronium bromide? Bring it on." They don't say that.

THE COURT: Okay. Thank you.

Mr. Gillette, anything else?

MR. GILLETTE: Just a couple points, Your Honor. I think he's covered all this here and in Cooper as well.

I don't think that counsel has proven anything in this case. They've made allegations, allegations that have been rejected not just in Cooper but in every other court that has considered them.

What the Ninth Circuit said in its opinion in Cooper in upholding Your Honor's denial of the temporary restraining order in that case I think bears repeating.

"While there can be no guarantee that error will not occur, Cooper falls short of showing that he is subject to an unnecessary risk of unconstitutional pain and suffering such that his

ER 731

execution by lethal injection under California's protocol must be restrained."

All of the complaints that have been made this morning about the possibility that something might go wrong, all those allegations were in the Cooper complaint. All those complaints were in Dr. Heath's declaration, the same as they are here, and none of them was found sufficient to warrant the granting of a temporary restraining order. And the same is true here.

Counsel cannot get past the fact that there is no basis for concluding that there is anything, anything like even a reasonable likelihood that he will not be unconscious after the delivery of the sodium pentathol.

The absence of any showing is the reason why the Department of Corrections denied the administrative appeals. We submitted those to the Court on Monday as our seventh exhibit and the explicit reason was he didn't give us any reason to believe that you have something other than your just information and belief for concluding that you might suffer pain and you want to make this complaint.

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The Eighth Amendment claim -- the First Amendment claim cannot survive the failure of his showing with respect to getting the injunction on the Eighth Amendment claim.

THE COURT: Thank you.

MR. GILLETTE: Thank you, Your Honor.

MR. LUBLINER: Your Honor?

THE COURT: Yes, Counsel?

MR. LUBLINER: A housekeeping matter, first of all. I just noticed last night that the exhaustion papers were kind of incomplete. I don't think that's Mr. Gillette's fault. I think there was some shuffling around at the warden's office. So what I have here is a copy of what we submitted to the CDC.

It's identical except it has a cover letter to the CDC and not the warden and does not have the Director's decision and it has some articles that Mr. Beardslee submitted justifying his concerns.

THE COURT: Why don't you lodge those and provide a copy to Mr. Gillette.

ER 733

Thank you.

MR. LUBLINER: And I'd just like to make one last remark.

THE COURT: Sure.

MR. LUBLINER: The Robert Alton Harris case in 1992 -- Mr. Harris was executed in 1992. Two years later this court found that lethal gas was cruel and unusual punishment, a decision that the Ninth Circuit affirmed.

This litigation is going on all around the country right now and eventually there's going to be more openness somewhere in the process, maybe not in California, maybe in some other state, but we believe, just as Judge Walker said, that changes are coming.

And I think it would be a horrible thing to have to look back and think, well, we could have done something about it back in 2004 rather than waiting until 2005, 2006, 2007.

THE COURT: Thank you. Well, actually --

MR. LUBLINER: We're in 2005.

THE COURT: That concern was why I asked Mr. Gillette the question I did about when this matter would be appropriate for plenary review and under what vehicle.

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I will take the matter under submission. I'm well aware of the execution date

and the need for whatever decision this Court makes to be reviewed by the Ninth Circuit and the Supreme Court. So I'll have a decision out by tomorrow at the latest.

The only observation I'd make because these proceedings obviously are matters of great public interest is this: This case in this posture is not about whether the death penalty is a wise thing or a moral thing, nor is it really even about whether at the end of the day lethal injection is the best possible means of carrying out the death penalty assuming that there should be a death penalty.

This case is about whether Mr. Beardslee has made the showing he is required to make under the law to obtain a temporary restraining order or a preliminary injunction on the eve of his execution. And it's a very discrete and distinct legal question which has to be answered against the backdrop of these much larger legal and moral questions, which nonetheless is a distinct legal question.

And the Court's ruling necessarily has to address that legal question and should not be read as an expression of the Court's views on

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anything larger than that.

I'm just echoing what Judge Browning said in his concurrence in Cooper, that this is not an attempt by this court to answer these larger questions. It's an attempt by this court to answer this specific legal question that's been put before it in an expeditious manner so that the rights of both the Petitioner and Mr. Cooper -- or Mr. Beardslee, rather, and the State can be fully vindicated and respected through the legal process.

So the matter is taken under submission and I will get a ruling out to you as soon as I possibly can.

(Whereupon, the proceedings concluded.)

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BR
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CERTIFICATE OF REPORTER

I, Peter Torreano, Official Court Reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

That the foregoing transcript is a full, true and correct transcript of the proceeding had in Beardslee v. Woodford, Case Number C-04-5381-JF, dated January 6, 2005; that I reported the same in stenotype to the best of my ability, and thereafter had the same transcribed by computer-aided transcription as herein appears.

BR
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PETER TORREANO, CSR
License Number C-7623

Cooper v. Rimmer

9th Cir.
08-12-2004
04-99001

Cite as 04 C.D.O.S. 7331

KEVIN COOPER, Plaintiff-Appellant,

v.

RICHARD A. RIMMER, Acting Director of the California Department of Corrections; JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California, Defendants-Appellees.

No. 04-99001

United States Court of Appeals for the Ninth Circuit

D.C. No. CV-04-00436-JF

Appeal from the United States District Court for the Northern District of California Jeremy D. Fogel, District Judge, Presiding Submitted February 8, 2004[FOOTNOTE *] Before: James R. Browning, Pamela Ann Rymer, and Ronald M. Gould, Circuit Judges.

COUNSEL

David T. Alexander, George A. Yuhas, and Lisa Marie Schull, Orrick, Herrington, & Sutcliffe LLP, San Francisco, California, for the plaintiff-appellant.

Holly D. Wilkens, Deputy Attorney General, San Diego, California, for the defendants-appellees.

Filed February 8, 2004

Amended August 12, 2004

ER 738

ORDER

The opinion filed February 8, 2004, 358 F.3d 655, is amended to include Judge Browning's concurrence.

PER CURIAM:

Kevin Cooper, a California death row inmate whose execution is scheduled for Tuesday, February 10, 2004 at 12:01 a.m., appeals the district court's order denying his motions for temporary restraining order and preliminary

injunction, and for expedited discovery, in his action pursuant to 42 U.S.C. § 1983 against Richard A. Rimmer, Acting Director of the California Department of Corrections, and Jeanne S. Woodford, Warden of California State Prison at San Quentin (collectively, Woodford). Cooper's action seeks to prevent Woodford from executing him in accordance with California's lethal injection protocol in violation of his Eighth Amendment right to be free from cruel and unusual punishment. He also makes an emergency motion to stay the execution date. We affirm the district court, and deny the motion.

I

Cooper filed this action on February 2, 2004. The district court held a hearing on February 5, and rendered its decision February 6. The court found that Cooper had brought his challenge at the eleventh hour. It noted that the Supreme Court stated in *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653, 653-54 (1992), that a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief, and was guided by the Court's treatment of similar last-minute challenges in recent weeks. *See, e.g., Vickers v. Johnson*, No. 03A633, 2004 WL 168080 (U.S. Jan. 28, 2004) (stay of execution denied); *Zimmerman v. Johnson*, No. 03A606, 2004 WL 97434 (U.S. Jan. 21, 2004) (same); *Beck v. Rowsey*, 124 S.Ct. 980 (Jan. 8, 2004) (stay of execution vacated). Absent a compelling justification for doing so (such as a material change in the law or factual circumstances or an exceptionally strong showing on the merits), the district court indicated that it should follow the Supreme Court's guidance. The court also observed that even though Cooper's action has the avowed purpose of addressing alleged deficiencies in the lethal injection protocol, the timing of Cooper's action suggests that an equally important purpose is to stay his execution to continue to pursue other claims.

On the merits, and apart from delay, the court found that Cooper had not met his burden of demonstrating either the likelihood of success on the merits or the existence of serious questions going to the merits. The court noted that every state and federal court to consider the question has concluded that lethal injection is constitutional, and that at least two courts which have examined protocols that, like California' s, use both sodium pentothal and pancuronium bromide have held that such protocols are constitutional. Further, the court found that Cooper had not articulated a compelling argument that to stop an inmate's breathing is not a legitimate state interest in the context of an execution. Finally, the court held that Cooper's argument that the California protocol is unconstitutionally vague presents no serious question. As it summarized Cooper's position, he "has done no more than raise the possibility that California's lethal-injection protocol risks an unconstitutional level of pain and suffering." Accordingly, the court found and concluded that Cooper has not met the standard for enjoining California's use of lethal injection, and has unduly delayed in asserting his claims. Thus, it denied the injunctive relief requested.

II

The parties dispute whether Cooper's challenge to the California protocol may properly be brought as a § 1983 action, or should instead be recharacterized as an application to file a second or successive petition under 28 U.S.C. § 2244(b). We need not decide this, however, because regardless of its procedural posture the challenge fails for reasons stated by the district court.

III

Lethal injection has been an authorized method of execution in California since 1992, and the presumptive method since 1996. Cal. Penal Code § 3604, *amended by* Stats. 1992, c. 558 (A.B. 2405) § 2, *amended by* Stats. 1996, c. 84 (A.B. 2082) § 1. Eight inmates have been executed by that method. Like other states, California uses a combination of three chemicals to carry out an execution by lethal injection: sodium pentothal, a barbiturate sedative; pancuronium bromide, a neuromuscular blocking agent; and potassium chloride, which stops the heart. Cal. Penal Code § 3604. Cooper points to a number of alleged deficiencies in California's protocol, including that use of pancuronium bromide serves only to mask what intense suffering could be experienced in combination with the other chemicals that are used, that the combination of chemicals can fail to work properly, that differences in physical characteristics can affect how successfully the system performs, that administering a single five gram dose of pentothal as compared with a continuous intravenous drip creates the risk that the barbiturate will not preserve unconsciousness long enough, and that the personnel California uses are not adequately trained in executing the protocol. He contends that it is impermissible for many veterinarians to use this combination of chemicals to euthanize animals, and he submitted declarations by Dr. Corey Weinstein, a doctor in private practice who is a medical consultant to prisoner organizations, describing possible complications and executions by lethal injection in California and elsewhere that appeared to be flawed,[FOOTNOTE 1] and by Dr. Mark Heath, an Assistant Professor of Clinical Anesthesiology at Columbia University, describing the effects of pancuronium bromide.

Woodford countered with a declaration from its experts indicating that a condemned inmate who is administered

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five grams of thiopental sodium will be rendered unconscious, and not experience pain for the time period necessary to complete the execution. Specifically, Dr. Dershwitz, a board-certified anesthesiologist on the faculty at the University of Massachusetts, states that over 99.999999999999% of the population would be unconscious within sixty seconds from the start of administration of this dosage of thiopental sodium. He also declares that this dose will cause virtually all persons to stop breathing within a minute of drug administration. Therefore, he opines, although the subsequent administration of pancuronium bromide would have the effect of paralyzing the person and preventing him from being able to breathe, virtually every person given five grams of thiopental sodium will have stopped breathing prior to that.

The district court applied the proper standard for deciding whether injunctive relief should be granted, *see Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984), and for determining whether the method of execution infringes the protections of the Eighth Amendment. The Eighth Amendment prohibits punishments that involve the unnecessary and wanton inflictions of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976); *Furman v. Georgia*, 408 U.S. 238, 269-70 (1972); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, Stevens, JJ.). The district court recognized that punishments are cruel when they involve torture or a lingering death. *In re Kemmler*, 136 U.S. 436, 447 (1890). It also properly weighed undue delay in the balance of equities.[FOOTNOTE 2] *Gomez*, 503 U.S. at 654 ("This claim [challenging execution by lethal gas] could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.").

We have previously upheld the constitutionality of lethal injection as a method of execution. *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997). Both involved executions by lethal injection in Arizona, but Cooper makes no case that there are material differences in California's process. He does argue that witnesses have perceived problems in California executions, but the possibility of unnecessary pain and suffering is purely speculative. *See Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994) (en banc) ("The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.").

Execution by lethal injection is now used by 37 of the 38 states with the death penalty,[FOOTNOTE 3] objectively indicating a national consensus. *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell, Stevens, JJ); *see Stanford v. Kentucky*, 492 U.S. 361, 367-70 (1989). Challenges to lethal injection have also been rejected by the courts of at least two states that have similar protocols but call for a lesser dosage of anesthesia than California's. *See State v. Webb, 252 Conn. 128, cert. denied*, 531 U.S. 835 (2000); *Sims v. State, 754 So. 2d 657 (Fla.), cert. denied*, 528 U.S. 1183 (2000).

Cooper argues that the debate is not as seen by the district court, over whether sodium pentothal in a 5 gram dose will cause unconsciousness; instead, it is whether the protocol sufficiently assures that this will occur and that the drug will have its intended effect. However, the district court's findings are well-supported in the record. While there can be no guarantee that error will not occur, Cooper falls short of showing that he is subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by lethal injection under California's protocol must be restrained.

AFFIRMED.

BROWNING, Circuit Judge, concurring:

Appellate review of the grant or denial of preliminary injunctive relief requires consideration of the merits of the underlying issue, but it does not decide them. *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). To obtain such relief, "the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor." *Roe*, 134 F.3d at 1402 (internal quotation marks omitted). We review for abuse of discretion the district court's decision to grant or deny a preliminary injunction or temporary restraining order. *Id.* " Our review is limited and deferential." *Southwest Voter*, 344 F.3d at 918. We determine only whether "the district court employed the appropriate legal standards governing the issuance of a preliminary injunction, and correctly apprehended the law with respect to the issues underlying the litigation." *Cal. Prolife Council Political Action Comm. v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999).

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Here, the district court relied on the correct standards for both issuance of a preliminary injunction and the underlying constitutional issue. We determine only that the district court did not abuse its discretion in applying the law to the factual record before it. Our decision under this standard of review does not necessarily reflect our

independent view of the evidence, for we are "not empowered to substitute [our] judgment" for the district court' s. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *accord Sports Form, Inc. v. United Press Int' l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). If the district court's decision relied on the correct law, its grant or denial of preliminary injunctive relief "will not be reversed simply because the appellate court would have arrived at a different result had it applied the law to the facts of the case. Rather, the appellate court will reverse only if the district court abused its discretion." *Sports Form*, 686 F.2d at 752.

Our review of the district court's merits decision -- if it is appealed -- will be more rigorous. Applying a *de novo* standard of review, we will assess for ourselves whether "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), require lethal injection procedures different from those California currently employs. *See Campbell v. Wood*, 18 F.3d 662, 681-82 (9th Cir. 1994) (en banc). Our decision may not reach the same conclusion as today' s, "[b]ecause of the limited scope of our [current] review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court . . . ." *Sports Form*, 686 F.2d at 753. Neither the district court nor the parties should read today's decision as more than a preliminary assessment of the merits.

:::::::::::::::::::::::::::: FOOTNOTE(S):::::::::::::::::::::::::::

FN*. The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

FN1. Cooper additionally notes the possibility that California will use a "cut-down" surgical procedure if it cannot find a vein sufficient to administer the chemicals, but does not dispute Woodford's evidence that medical examinations have shown his veins are sufficient.

FN2. Cooper was aware of the potential for a claim of the sort made in this action when he filed his first federal habeas petition in 1994 (amended in 1996 and supplemented in 1996), for in that petition he claimed that he was deprived of the right to select the method of execution as lethal gas had just been enjoined by a federal district court in *Fierro v. Gomez*, 790 F.Supp. 966 (N.D. Cal. 1992).

FN3. Alabama, Ala. Code 1975 § 15-18-82; Arizona, Ariz. Rev. Stat. Ann. § 13-704; Arkansas, Ark. Code Ann. § 5-4-617; California, Cal. Penal Code § 3604; Colorado, Colo. Rev. Stat. Ann. § 18-1.3-102; Connecticut, Conn. Gen. Stat. § 54-100; Delaware, Del. Code Ann. tit. 11, § 4209(f); Florida, Fla. Stat. Ann. § 922.105; Georgia, Ga. Code Ann., § 17-10-38; Idaho, Idaho Code § 19-2716; Illinois, 725 Ill. Comp. Stat. Ann. 5/119-5(a)(1); Indiana, Ind. Code Ann. § 35-38-6-1; Kansas, Kan. Stat. Ann. § 22-4001; Kentucky, Ky. Rev. Stat. Ann. § 431.220; Louisiana, La. Rev. Stat. Ann. § 15:569 B; Maryland, Md. Code Ann., Corr. Servs. § 3-905; Mississippi, Miss. Code Ann. 99-19-51; Missouri, Mo. Rev. Stat. § 546.720; Montana, Mont. Code Ann. § 46-19-103; Nevada, Nev. Rev. Stat. § 176.355 1; New Hampshire, N.H. Rev. Stat. Ann. § 630:5 XIII.; New Jersey, N.J. Stat. Ann. § 2C:49-2; New Mexico, N.M. Stat. Ann. § 31-14-11; New York, N.Y. Correct. Law § 658; North Carolina, N.C. Gen. Stat. § 15-187; Ohio, Ohio Rev. Code Ann. § 2949.22; Oklahoma, Okla. Stat. Ann. tit. 22, § 1014; Oregon, Or. Rev. Stat. § 137.473, *amended by* 2003 Or. Laws 103; Pennsylvania, Pa. Stat. Ann. tit. 61, § 3004; South Carolina, S.C. Code Ann. 24-3-530; South Dakota, S.D. Codified Laws § 23A-27A-32; Tennessee, Tenn. Code Ann. § 40-23-114; Texas, Texas Crim. Proc. Code Ann. § 43.14; Utah, Utah Code Ann. § 77-18-5.5; Virginia, Va. Code Ann. § 53.1-233; Washington, Wash. Rev. Code Ann. § 10.95.180; and Wyoming, Wyo. Stat. Ann. § 7-13-904.

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CAPITAL, E-Filing, RELATE

U.S. District Court

California Northern District (San Jose)

CIVIL DOCKET FOR CASE #: 5:04-cv-05381-JF

Beardslee v. Woodford et al
Assigned to: Judge Jeremy Fogel
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 12/20/2004
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

Petitioner

Donald J. Beardslee

represented by **Steven Samuel Lubliner**
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
707-789-0516
Fax: 707-789-0515
Email: sslubliner@comcast.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

Jeanne Woodford
Director of the California Department of Corrections

represented by **Dane R. Gillette**
State Attorney General's Office
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
415/703-5866
Fax: 415/703-5877
Email: dane.gillette@doj.ca.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

Jill L. Brown
Acting Warden, San Quentin State Prison, San Quentin, CA

represented by Dane R. Gillette
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Miscellaneous

Habeas Corpus Resource Center

represented by Habeas Corpus Resource Center
50 Fremont Street
Suite 1800
San Francisco, CA 94105

BR 7484

415-348-3800
Email: mlaurence@hcrc.ca.gov
PRO SE

Miscellaneous

California Appellate Project represented by **California Appellate Project**
Federal Court Docketing
101 Second Street
Suite 600
San Francisco, CA 94105
415-495-5616
Email: lfox@capsf.org
PRO SE

Date Filed	#	Docket Text
12/20/2004	1	COMPLAINT (Summons Issued); against Jeanne Woodford, Jill L. Brown (Filing fee $ 150, receipt number 3367267.). Filed byDonald J. Beardslee. (ys, COURT STAFF) (Filed on 12/20/2004) Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). (Entered: 12/21/2004)
12/20/2004	2	MOTION for Expedited Discovery, MOTION to Compel Production of Documents filed by Petitioner Donald J. Beardslee. (db, COURT STAFF) (Filed on 12/20/2004) Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). (Entered: 12/21/2004)
12/20/2004		CASE DESIGNATED for Electronic Filing. (db, COURT STAFF) (Filed on 12/20/2004) (Entered: 12/21/2004)
12/20/2004	3	Declaration of Steven S. Lubliner in Support of 2 MOTION for Expedited Discovery MOTION to Compel Production of Documents filed by PetitionerDonald J. Beardslee. (Related document(s)2) (db, COURT STAFF) (Filed on 12/20/2004) Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). (Entered: 12/21/2004)
12/20/2004	4	Administrative Application to file oversized motion for temporary restraining order: Preliminary injunction and order to show cause by petitioner Donald J. Beardslee. (db, COURT STAFF) (Filed on 12/20/2004) (Entered: 12/21/2004)
12/20/2004	5	EXHIBITs in support of plaintiff's motion for temporary restraining roder, preliminary injunction and order to show cause: Volume 1 by petitioner Donald J. Beardslee.. (db, COURT STAFF) (Filed on 12/20/2004) Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). (Entered: 12/21/2004)
12/20/2004	6	EXHIBITS in support of plaintiff's motion for temporary restraining order, preliminary injunction and order to show cause: Volume 2 by Plaintiff Donald J. Beardslee.. (db, COURT STAFF) (Filed on

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		12/20/2004) Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). (Entered: 12/21/2004)
12/20/2004		Received Plaintiff's Motion for Temporary Restraining Order: Preliminary Injunction, and order to Show Cause: Memo of points and Authorities in support thereof, by Plaintiff Donald J. Beardslee. (db, COURT STAFF) (Filed on 12/20/2004) (Entered: 12/21/2004)
12/20/2004		Proposed Order re 8 MOTION for Preliminary Injunction MOTION for Order to Show Cause MOTION for Temporary Restraining Order by plaintiff Donald J. Beardslee. (db, COURT STAFF) (Filed on 12/20/2004) (Entered: 12/21/2004)
12/20/2004		Proposed Order re 2 MOTION for Expedited Discovery MOTION to Compel Production of Documents by plaintiff Donald J. Beardslee. (db, COURT STAFF) (Filed on 12/20/2004) (Entered: 12/21/2004)
12/20/2004	9	ORDER RELATING CASE to C04-436 JF. Signed by Judge Susan Illston on 12/20/04. Case remains with Judge Fogel(db, COURT STAFF) (Filed on 12/20/2004) (Entered: 12/21/2004)
12/21/2004	7	ORDER granting plaintiff's administrative application to file oversized motion for temporary restraining order: Preliminary Injunction: and Order to Show Cause re (Received Document) filed by Plaintiff Donald J. Beardslee, (db, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/21/2004)
12/21/2004	8	MOTION for Preliminary Injunction, MOTION for Order to Show Cause, MOTION for Temporary Restraining Order. Memo of points and authorities in support thereof, filed plaintiff by Donald J. Beardslee. (db, COURT STAFF) (Filed on 12/21/2004) Additional attachment(s) added on 1/6/2005 (gm, COURT STAFF). (Entered: 12/21/2004)
12/21/2004	10	ORDER scheduling briefing and hearing; setting hearing on 1/6/05 at 1:30 p.m.(Although petitioner is not registered for e.filing, this order was e.mailed directly to him by the death penalty clerk.). Signed by Judge Illston on 12/21/04. (ts, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/21/2004)
12/21/2004	11	Scheduling ORDER (corrected). Signed by Judge Illston on 12/21/04. (ts, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/21/2004)
12/23/2004	12	scheduling ORDER; setting preliminary injuction hearing on 1/6/05 @ 10:30 a.m.. Signed by Judge Illston on 12/22/04. (ts, COURT STAFF) (Filed on 12/23/2004) (Entered: 12/23/2004)
12/28/2004	13	Memorandum in Opposition *DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION* filed byJeanne Woodford. (Gillette, Dane) (Filed on 12/28/2004) (Entered: 12/28/2004)
12/28/2004	14	EXHIBITS *IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND*

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		PRELIMINARY INJUNCTION filed byJeanne Woodford. (Gillette, Dane) (Filed on 12/28/2004) (Entered: 12/28/2004)
12/30/2004	15	Reply to Opposition re 8 MOTION for Preliminary Injunction MOTION for Order to Show Cause MOTION for Temporary Restraining Order filed byDonald J. Beardslee. (Lubliner, Steven) (Filed on 12/30/2004) (Entered: 12/30/2004)
01/01/2005	16	CERTIFICATE OF SERVICE by Donald J. Beardslee re 1 Complaint *(defendant Brown)* (Lubliner, Steven) (Filed on 1/1/2005) (Entered: 01/01/2005)
01/01/2005	17	CERTIFICATE OF SERVICE by Donald J. Beardslee re 1 Complaint *(defendant Woodford)* (Lubliner, Steven) (Filed on 1/1/2005) (Entered: 01/01/2005)
01/03/2005	18	NOTICE of Appearance by Dane R. Gillette *Notice Of Appearance As Counsel* (Gillette, Dane) (Filed on 1/3/2005) (Entered: 01/03/2005)
01/03/2005	19	EXHIBITS *Supplemental Exhibit In Support Of Defendants' Opposition To Motion For Temporary Restraining Order And Preliminary Injunction* filed byJeanne Woodford, Jill L. Brown. (Attachments: # 1 Exhibit 7) (Gillette, Dane) (Filed on 1/3/2005) (Entered: 01/03/2005)
01/06/2005	20	Minute Entry: Application for Temporary Restraining Order/or Preliminary Injunction hearing held on 1/6/2005 before Judge Jeremy Fogel (Date Filed: 1/6/2005). Application for Temporary Restraining Order/or Preliminary Injunction is taken under submission. (Court Reporter Peter Torreano.) (dlm, COURT STAFF) (Date Filed: 1/6/2005) (Entered: 01/06/2005)
01/06/2005	21	TRANSCRIPT of Proceedings held on 1/6/2005 before Judge Jeremy Fogel. Court Reporter: Peter Torreano.. (gm, COURT STAFF) (Filed on 1/6/2005) (Entered: 01/07/2005)
01/07/2005	23	ORDER DENYING MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND FOR EXPEDITED DISCOVERY. Signed by Judge Jeremy Fogel on 1/7/05. (jfsec, COURT STAFF) (Filed on 1/7/2005) (Entered: 01/07/2005)

PACER Service Center			
Transaction Receipt			
01/09/2005 11:10:19			
PACER Login: [redacted]		Client Code:	
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Billable Pages:	3	Cost:	0.24

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